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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,
Plaintiffs,
vs.
R.J. REYNOLDS TOBACCO
COMPANY, et al.,
Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
1:35 p.m.
Tuesday, November 24, 1998

TRIAL - VOLUME 147

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

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APPEARANCES:
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SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs
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ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris
COLL DAVIDSON CARTER SMITH SALTER & BARKETT
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On behalf of Defendant Philip Morris
ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris
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On behalf of Defendant R.J. Reynolds
JONES, DAY, REAVIS & POGUE
DIANE G. PULLEY, ESQ.
RICHARD M. KIRBY, ESQ.
On behalf of Defendant R.J. Reynolds
KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson
CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group
SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

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DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
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On behalf of Defendant The Council for Tobacco Research

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(APPEARANCES - Continued)
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On behalf of Defendant Lorillard
MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp. and Tobacco Institute
KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group and Brooke Group

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I N D E X

WITNESS PAGE
DR. IAN UYDESS
Direct by Mr. Rosenblatt (Cont'd) 16031
Cross by Mr. Heim 16073
Redirect by Mr. Rosenblatt 16144

E X H I B I T S

PLAINTIFFS' EXHIBITS — OFFERED PAGE — ADMITTED PAGE — FOR ID PAGE
None.

E X H I B I T S

DEFENDANT'S EXHIBITS — OFFERED PAGE — ADMITTED PAGE — FOR ID PAGE
036328 16105
036327 16095
036326 16117

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(Whereupon, the following proceedings were had:)

THE COURT: Okay. Have a seat.
We are much better in here than they are out there because it was miserable out there. I

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think they
had a monsoon.
MR. HEIM: Wow.
THE BAILIFF: Are we ready for the witness?
MR. MOSS: It changed in a half hour.
THE COURT: Real quick.
Is the witness outside?
THE BAILIFF: Yes.
THE COURT: Bring the witness in, please, and
the jury.
THE BAILIFF: Bringing in the jury.
(The jury entered the courtroom.)
THE COURT: Okay. I believe everybody is
here. You can have a seat. Thank you.
All right. We can proceed.
DIRECT EXAMINATION (Continued)
BY MR. ROSENBLATT:
Q. Dr. Uydess, just before we broke for lunch, I
was going to get to a new area, but I think you were
explaining -- I had asked you about the concept of
ratooning and what that meant with respect to tobacco.
I don't think you had finished your answer.

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A. Again, that agricultural practice had several
possibilities; one of which, as I said, was yielding
another crop from the same field, so that was
economically beneficial for the farmer, you know, to do
that.
Philip Morris, I think, had some of that
possibly in mind, but what I knew better about that
particular study was that one of the target areas had
to do with things like nicotine, other constituents in
the leaves of those plants that were regrown, and
because one of my projects had to do with nicotine
synthesis in the plant, one of the programs that I was
asked to head up had to do with how nicotine is made in
the roots of the plant and gets shipped up to the
plant, which is what happens in the tobacco plant.
And during the growth of a tobacco

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plant,
when it's young and the roots are very small and it's
just starting to grow, nicotine is being synthesized
and those small number of roots are shipping the
nicotine to the plant, and as the plant grows and the
roots become much larger, more and more nicotine is
going up into the plant.
So one of the questions, scientific questions
that was asked, was if we ratoon the plants, if we cut
them back just before they actually reach maturity, and

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let them continue to grow, regenerating some new plants
from that stem that was, you know, cut back, would we
have leaf with, let's say, higher nicotine in it? Is
that a possibility?
And so part of that study, not the entire
study, but part of it was to examine those kinds of
scientific questions.
Q. Were any conclusions reached about that, as
to whether you could increase the nicotine?
A. I wasn't privy to all of the results. I saw
some of them, the reports, and on occasion, what I saw
was, that, yes, higher nicotine was what you got in
some of the leaves that grew back, which is
scientifically what you would expect.
Q. Now, you left Philip Morris in 1989. Tell
us, you know, in a general way, what you have been
doing professionally to earn a living since then.
A. Well, for the last six years, in particular,
I have been working within the pharmaceutical industry,
until recently, as an employee of a company that
actually helps the pharmaceutical industry do all of
the testing, clinical -- what they call the clinical
trials and other kinds of testing, to make sure that a

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new drug product that a pharmaceutical company is trying to develop is safe and effective for the public

to use.

And the company I worked for helped those pharmaceutical companies, their clients, set up and conduct all these trials that they have to do as part of the FDA regulatory system that the pharmaceutical industry is under.

And so I've done that for like five or six years, and within the last year, decided, kind of at the prompting of some of the clients we had, to kind of go out on my own as a consultant and supply the things I did for that company, now to them directly.

So I'm now a consultant doing many of the things I used to do at the previous company.

Q. Do you actually train people in terms of how to obtain approval from the Food and Drug Administration?

A. Certain aspects of that, with particular regard to how scientific studies have to be conducted, so that they can get FDA approval, with regard to documentation practices, making sure that everything learned from the scientific studies is disclosed, both to the FDA and the public. Anything that's observed has to be reported to the FDA, as part of the study, even though it may or may not have something to do with the drug being developed, because we don't know at that

point and so all of it has to be disclosed.

And so I deal with the regulatory compliance issues as part of what I do for my clients. I train them in these issues.

Q. What is the significance, from the

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standpoint
of a pharmaceutical company, of having or not having
FDA approval?
A. Without FDA approval, you cannot bring a
pharmaceutical product that's controlled under those
guidelines to market.
Q. You can't sell it?
A. You can't sell it, because they've been
designed to help protect the public against products
that are defective, that someone has put together
without covering the right bases, because of the
accidents that have happened over the last 30 years
where the public has been injured, sometimes
accidentally, sometimes through negligence, because
certain companies didn't do the right things when they
were developing their products.
Q. Give us an example of a couple of products
where you have actually walked it through FDA approval?
MR. MOSS: Your Honor, can we go sidebar?
THE COURT: Yes, sir.
(Proceedings were had at sidebar.)

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BY MR. ROSENBLATT:
Q. Dr. Uydess, does the Food and Drug Administration regulate cigarettes?
A. No.
Q. Does the Food and Drug Administration
regulate nicotine?
A. In the pharmaceutical industry, it does.
Q. Okay. It regulates nicotine patches, but it
doesn't regulate cigarettes?
A. Nicotine patches, gums, artificial devices
that look like cigarettes but are not -- all of those
vehicles that the pharmaceutical industry has developed
to help people quit smoking are all regulated, heavily,
but the FDA.
Q. As opposed to cigarettes?
A. Yes.
Q. Now, you left Philip Morris in 1989. Did

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there come a time that you were contacted by the Food and Drug Administration?

MR. HEIM: Objection, Your Honor.

A. Yes. Many years after.

MR. MOSS: Just a minute. There's an objection.

THE COURT: Okay. I have to talk to you about this one, too.

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Forgive us, folks.

(Proceedings were had at sidebar.)

BY MR. ROSENBLATT:

Q. You had a pretty good job at Philip Morris, didn't you, for those 11 years?

A. I really had a great job.

Q. The pay was good?

A. Yes.

Q. Benefits were good?

A. Excellent.

Q. Working condition was good?

A. Wonderful.

Q. A lot of people you liked? A lot of colleagues there?

A. Yes.

Q. So what happened? 1989, you, what, did you get fired?

A. No. No.

Q. You quit?

A. Yes.

Q. Why?

A. Over those accumulated 11 years, 10 and a half, 11 years of being there, and being part of, directly or indirectly, so many programs that were designed to try to make a safer product, which is what

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I was told when I came in the door, this was the area I would be working in. And seeing so many of them never go to completion, just make a lot of accomplishments, be shut down, not used, time and time again -- and really not even my projects -- I'm not talking about me and my projects, just throughout Philip Morris, in this particular area is what I'm talking about,

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smoking and
health, you know, nicotine, to a certain extent, but
mainly smoking and health for me, which is, with my
background, the most important subject to me
personally, and after seeing all these opportunities --
and to me, these were missed opportunities. I mean,
you may not --
Q. Missed opportunities for who?
A. For the public, for the consumers of Philip
Morris' and other tobacco companies' products, but
mainly Philip Morris, who is who I worked for.
But they had all these opportunities to not
have the perfect solution yet maybe, but could
introduce one of these many processes that they had at
their hand into production, and at least offer maybe
one cigarette product on the market, and keep it there,
not let low market share deter them. Keep it there,
much like the cola industry when they came out with
decaffeinated colas.

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I mean, I remember kind of when decaffeinated
colas came out, I didn't like them. I don't think they
really had a big market share, but they were put out
there for -- to offer an alternative to people who
wanted a healthier product without caffeine.
And I'm sure those companies weren't sure
that was the right decision then, and they did it. And
over the years, it became very popular and it was
beneficial to the public, and over the years I kind of
felt that's where we were going, that's where I thought
Philip Morris was going.
Q. Was there a particular incident or event
which convinced you that that's not where Philip Morris
was going?
A. Yes. I guess I'd have to say there was.
In addition to all these various

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programs,
many of which were not mine, were other people's
programs that were not being utilized in any fashion,
as far as I could tell, one day --
Q. Such as?
A. Oh, the various nitrosamine extraction
procedures that were, you know, being investigated, and
things like that.
Ways of controlling nicotine delivery, just
through the chemistry and physics of the cigarette,

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without playing these additional games to kind of bring
it back up to above where most people thought it was,
you know.
I was asked to give a presentation at -- when
Philip Morris acquired a lot of other companies like
General Foods and Kraft, which were really great things
to have happen, and it was interesting because they
were acquiring other companies who were totally
regulated in these areas by the FDA, because they were
in the food and beverage industry, which is ironic, I
was asked to give a -- one of the few talks at what
they called a symposium, synergy symposium, trying to
bring all of the companies together, all their R&D
scientific people together, to kind of say, look, we're
all part of the same team, let's talk a little bit
about what we each do and see how we can pool
information in the future.
So they selected a few scientists from Kraft
and General Foods and Philip Morris, and I was
fortunate to be one of the people they asked to give a
talk.
And we were up at General Foods in Westchester, outside of New York, for several days
doing this, and it was great.
On the way back on the corporate plane, I was

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with my executive management team, Charles Lilly, and others, I believe Houghton was there, and they began talking about the industry, about what their goal as executives at Philip Morris was, and it was really just tied to market share and money.
I just realized on the plane that they weren't interested in using a lot of the technologies available.
Q. To make a safer cigarette?
A. Yes. And I just felt like if I was going to spend my efforts working in this area, that I probably should work somewhere else, and very hesitantly decided that I needed to leave, because I just was very disappointed scientifically in the company's decisions, and morally felt that it wasn't right. And ethically. And I just decided on that plane that the next few weeks, next couple of months, I would find a way to find other employment.
Q. And you followed through on that?
A. Yes.
Q. Now, when you -- when you left Philip Morris in 1989, did you -- did you start calling lawyers and telling -- tell them that you were an unhappy former Philip Morris employee?
Did you volunteer your services to testify?

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A. No.
Q. So, what was your next -- you quit in 1989. What was your next involvement with the tobacco industry, directly or indirectly?
A. One day --
MR. HEIM: Objection, Your Honor.
THE COURT: Overruled.
A. One day I came home. While I was being employed at Pharmaco, which was the company

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that we
kind of alluded to before, the pharmaceutical type
company -- it doesn't make drugs or pharmaceutical
products, but it's one of the companies that are out
there, and there are several like them that helped
pharmaceutical companies test their drugs to make sure
they are tested properly, to get approval to put them
out to market. I'd been with them for a year or so and
came home, and had a voice mail, voice message on my
phone.
A gentleman identified himself as an agent --
MR. MOSS: Your Honor, just --
THE COURT: I don't want to get into the
conversation that you had with him.
THE WITNESS: Oh, okay.
I found a phone message. That phone message
asked me if I would meet with someone to discuss the

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tobacco industry and my employment at Philip Morris.
I did --
BY MR. ROSENBLATT:
Q. From who? Who was that individual?
MR. MOSS: Objection, Your Honor.
THE COURT: Overruled as to the individual.
A. It was an agent who was at the time assisting
the FDA. It was not a FDA person, but it was an agent
who had been assigned to the FDA to help them with the
investigation they had been conducting over a period of
a couple of years.
And I declined. I didn't --
MR. HEIM: Your Honor, I move to strike the
last part of that answer.
THE COURT: Overruled.
A. I felt very awkward about this. It wasn't a
comfortable feeling that I had. And never responded to
it. Didn't call anybody back.
BY MR. ROSENBLATT:
Q. You got the message, but you did not --

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A. I got the message, and I decided, I'll just pass for now on this.

A number of months went by, and I was contacted again.

Q. By the same individual?

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A. Yes.

Q. With the same request?

A. Yes. Very kind of standard request: Would you consider meeting with us to discuss your experiences at Philip Morris?

And hesitantly, myself, I kind of decided, I'll try it. And spoke to them. Spoke to him. And kind of established certain ground rules.

I wanted to know what this meant if I meet with you. And they said the first meeting would be just fairly superficial, just meet, say hello to each other.

MR. HEIM: Your Honor, I'm going to object to going into this in any way.

THE COURT: Suffice to say that you met with them. You talked with them.

THE WITNESS: Yes. I finally met with them, talked to them, and that lead to subsequent meetings.

BY MR. ROSENBLATT:

Q. Okay. And what year was it -- you quit in '89. What year was it that you actually sat down and met with any representative of the Food and Drug Administration?

MR. MOSS: Objection, Your Honor.

THE COURT: As to the year, overruled.

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If you know.

A. Late '93, early '94. It's hard -- I can't remember.

Q. In that period?

A. Yes.

Q. In that time?

A. It was in the '93/94 period.

Q. Before that first message you had

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from the
individual who said he was with the FDA, had you had
any inkling, any forewarning, that you were going to be
contacted, either by the FDA or any other governmental
agency relating to tobacco?
A. No. At that point in time, no.
Q. During the 11 years that you were at Philip
Morris, had any of your projects, which were in any way
related to the development of a safer cigarette, ever
come to fruition?
A. Be put into product to make a --
Q. Yes.
A. -- product that was sold to the public?
Q. Correct.
A. No.
Q. Dr. Uydess, this document is in evidence, A
Frank Statement to Cigarette Smokers, and I'm going to
ask you where my thumb is, the statement which says --

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the statement of Philip Morris and others, which says:
We accept an interest in people's health as a basic
responsibility, paramount to every other consideration
in our business.
And my question to you, sir, is, during the
11 years that you were with Philip Morris --
A. Can I read that? I can't --
MR. HEIM: Your Honor, while he's reading,
may we approach on this issue?
THE WITNESS: Is that okay?
MR. ROSENBLATT: Sure.
THE COURT: Yes.
(Proceedings were had at sidebar.)
BY MR. ROSENBLATT:
Q. Dr. Uydess, during the 11 years you were at
Philip Morris, and with particular reference to the
time of your decision to leave, in terms of the work
that you were doing and in terms of your area of
expertise during those 11 years, what was the paramount
consideration of Philip Morris?
A. Market share. Market share and

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money.
MR. ROSENBLATT: Thank you very much.
THE COURT: Cross?
MR. HEIM: Yes, sir.
Your Honor, would you like to start for a

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while and then take the afternoon break a little later,
or do you want to take it now?
THE COURT: It depends on how long you're
going to be.
MR. HEIM: Oh, I'm probably -- do you want me
to guess? About an hour, I guess.
THE COURT: Okay. It depends on you folks.
Do you want a break now?
JURORS: (Responds negatively.)
MR. HEIM: Keep going. All right. We'll
keep going.
Charge ahead.
Maybe we'll get out earlier then.
All right.

CROSS-EXAMINATION

BY MR. HEIM:
Q. Good afternoon, Dr. Uydess.
My name is Bob Heim. We met very, very
briefly for a moment this morning. And I'm going to be
asking you some questions on different topics that you
talked about. And I'll try to kind of let you know
where I'm going so you know what I'm talking about.
Okay?
A. Yes. Thank you.
Q. I want to start with some testimony earlier

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today, about Philip Morris scientists avoiding the use
of the term addiction. Do you recall that testimony?
A. Generally, yes.
Q. Okay. Well, let me ask you about some of
these scientists.
When Dr. DeNoble wrote memoranda at the
company about his work with nicotine, I gather he

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didn't typically, in the ordinary course of business,
send you a copy of his memos; did he?
A. No. I would not have been on the circulation
list for those reports.
Q. Okay. And would that be true also of
memoranda or reports that Dr. Dunn did; you wouldn't be
on the normal circulation list for his reports?
A. In most cases, probably not.
Q. And how about Frank Ryan? I can never
remember whether he was a Dr. Ryan or Mr. Ryan, and I'm
not sure it's important, but would you -- you would not
have been on the normal circulation list for Dr. Ryan's
work?
A. Again, probably in most cases not.
Q. And as I remember from your testimony this
morning, Dr. Osdene was a little higher up in the
organization than you were; right?
A. Yes.

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Q. Okay. So, in terms of the memoranda and
things that he would write, typically, normally you
wouldn't be on the distribution list for that; right?
A. In most instances not.
Q. Okay. Now, have you ever, while you were
there, did you ever try to look in any systematic way
at the memoranda that were written by people like
Dr. Osdene and Dr. Dunn, Dr. DeNoble, to review their
memoranda to see whether they actually used the word
addiction or not in their memoranda?
A. No.
Q. Okay. And let me show you one as an example.
THE COURT: Before it is given to the
witness, it should be marked for identification.
MR. HEIM: May I?
THE COURT: Yes. That's fine.
BY MR. HEIM:
Q. Dr. Uydess, I'm handing you a document that's

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been previously marked for identification as Defendants' Exhibit 05514, and it's dated July 23rd, 1980.

Now, this is a memorandum that's actually from all four of those people that I just mentioned; is it not? Dr. DeNoble, Dr. Dunn, Dr. Osdene and Dr. Ryan?

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A. Yes. It appears to be.

Q. Okay. And the subject of it is, Self-Administration, Reinforcement and Addiction.

Do you see that?

A. Yes.

Q. And if you look down through this document, down to the end of the first paragraph, you'll see where they talk about the word addictive as very poorly defined.

Do you see that in there?

A. Yes, I do.

Q. Okay. And then down at the bottom, they talk about the criteria for what is addictive and what is not, and then they come to a conclusion about the establishment of nicotine's position among reinforcers, coupled with clear evidence that nicotine's self-administration does not meet the established criteria for addiction would be most helpful in clarifying smoking behavior.

A. Where is that you're reading? I'm sorry.

Q. I'm sorry?

A. Where is it that you were reading?

Q. I was reading the last sentence.

A. Okay. Number three?

Q. Right.

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Now, my question to you is -- did -- in this work on -- that was being done on self-administration, reinforcement and addiction, did you at any time see the reports on this subject that Dr. DeNoble was making?

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A. Did I ever see them?
Q. Did you see them? I'm sorry. I meant to say see them.
A. Yes. On occasion I did see them.
Q. Okay. Did you look in those reports to see whether they used the word addiction or addictive?
A. No, I did not.
Q. You did not. In order to know whether scientists like Dr. DeNoble and Dr. Ryan and Dr. Dunn were using the word addiction in their memoranda, you would have to kind of look through their memoranda and see whether they were using that term or not; is that fair?
A. With respect to those written documents, but that also excludes the verbal use of the word, which I never --
Q. I understand that.
A. -- heard while I was there.
Q. What you're saying is, to your knowledge, it didn't occur while you were there; right?

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A. Not only it didn't occur, was something you would not do, normally.
Q. But you weren't privy to every time that Dr. Dunn and Dr. DeNoble had a conversation, of course; were you?
A. No, I was not.
Q. All right. So you can't testify of personal knowledge, can you, sir, that Dr. Dunn and Dr. DeNoble didn't use the term addiction, discuss addiction, discuss what it meant?
A. Oh, I'm sure they may have done that. I just, in speaking about that topic, mention it's not normally something you would do publicly within Philip Morris.
Q. Okay.
A. You didn't walk around the halls mentioning the word addiction or addictive or nicotine with those

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two other words. No more than you would cancer and carcinogen.

Q. So you didn't mean to suggest that when Dr. Dunn and Dr. Osdene, or Dr. DeNoble or Dr. Ryan were discussing their work, that they weren't using the word addiction among themselves?

A. No, because it would have been very appropriate for them to have used that word with regard

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to somebody that worked on nicotine.

Q. All right. And I think you just said that, without looking at all of their memoranda, you couldn't tell whether they were writing the word addiction and discussing it in their papers; correct?

A. In some of their papers, no.

Q. Okay. Now, in fact --

A. Excuse me. Are we going to refer to this anymore?

Q. I don't think so. You can set it down.

A. I didn't know if I have to refer back to it.

THE COURT: Put it there.

MR. HEIM: Put it on the Judge's table.

THE WITNESS: I'm sure it's safe there.

THE COURT: That's fine.

BY MR. HEIM:

Q. Now, the word -- the word addiction, that was a word that had lots of different meanings, did it not, as you understood it?

A. People used it within different contexts. Its actual definition is fairly complex. It's not a simple sentence, which is part of the reason we all argue about the word, you know.

Q. So different people can mean different things when they use the word addiction; you'd agree with

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that?

A. Sometimes.

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Q. Sometimes people use it strictly in a confined way and sometimes they don't?
A. Yes. Or generally to discuss a topic.
Q. And are you aware that different organizations have changed their definition of addiction over time?
A. I understand that some of that has occurred, although I don't know the exact changes that were made each time.
Q. Okay. And you're not an expert on this subject of the changing definitions of addiction?
A. Not on that particular subject, no.
Q. But you do know that there's a classic definition of addiction that has been used in the literature?
A. I understand there is --
Q. Okay.
A. -- a historic, classic definition, that's quite old, I understand.
Q. All right. And that classic definition is different -- and I'm not trying to make you an expert on this subject, Doctor, but it's different than the more -- what shall we call it -- broader, nonclassical

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definition; right?
It has different criteria?
A. Yes. Sometimes we use the word more generally than more strictly, yes.
Q. All right. So you would agree that certain things that are considered addictive under the classical definition might not be addictive under the nonclassical definition, or vice versa; right?
A. Yes. Again, where we're using the word casually, like I'm addicted to chocolate, which we don't mean you're addicted to chocolate, you just like it a lot and eat it a lot, but it doesn't necessarily mean you're addicted to it, yes.
Q. What you're referring to is people just generally using addictive in a -- in a vernacular

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16 sense, I'm addicted to --
17 A. Love or something.
18 Q. -- to love?
19 A. To song.
20 Q. Or to --
21 A. I didn't mean you personally.
Sorry.
22 Q. You're prodded by too many
illustrations of
23 what people say they're addicted to in the
public life;
24 right?
25 A. Yes.

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30
1 Q. So it's a loose term in the public
life. And
2 even in the scientific literature, addiction
has had
3 different meanings, depending upon the
criteria that
4 are used to define it; right?
5 A. Sometimes.
6 Q. You're aware, for example, that one
7 definition of addiction requires an
intoxication aspect
8 to it?
9 A. Yes. I understand that word is
used. And,
10 again, it goes back many, many years before we
had the
11 understanding we have today about what
addiction really
12 is. The molecular mechanisms involved. So,
yes, that
13 term was in the original definition.
14 Q. Okay. And would you consider that
term part
15 of what is known as the classical definition?
16 A. The original, older definition that
some
17 people like to, you know, adhere to, yes.
18 Q. Okay. Now, there are other words
that people
19 use as well, like habituating; right?
20 A. Yes.
21 Q. That's another term. You've heard
the term
22 reinforcing used?
23 A. Yes.
24 Q. Okay. And you would agree, based on
your
25 experience, that reinforcing is not the same
as

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1 addictive?
2 A. Not exactly, no.
3 Q. So, something can be reinforcing and

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not be
addictive?
A. Yes. Although when something is addictive, it usually has a reinforcing component to it.
Q. So it works one way, but not necessarily the other way?
A. Not necessarily.
Q. Okay. The fact that something is pharmacologically active doesn't mean it's addictive; correct?
A. Correct.
Q. Okay. And do you think that the fact that something is habituating would necessarily equate it with being addictive?
A. It depends on what other words you're comparing it to. And, again, if you're going back to the old classic definition of addiction, it may not be equivalent, but is a lot closer than just, you know, some of the other words like we were talking about.
Q. All right. So this is -- this whole area of habituation, reinforcement, intoxication criteria is one that really, it's -- in the scientific community, it's something that you have to know what somebody

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really means by it when you -- when you hear the term, in order to understand what they're talking about; right?
A. Yes. As you become more specific about what you're talking about, you need to make sure you're using the appropriate terms to describe that, within the context of whatever you're discussing, yes.
Q. Okay. Now, I want to go to -- I want to move to a different area, now, and I want to go to an area that I believe you said you spent a lot of time on, and that's in your own work at the company, and that's this area of naturally-occurring denitrification.

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Since I
don't want to say naturally-occurring denitrification
all of the time, can we call it NODs?
A. Yes. That's why we called it NOD, because
nobody wanted to say denitrification.
Q. Okay. I want to make sure the jury understands what this NOD process was.
And let me ask you this as a start.
How much of your time do you think you spent
on the NOD project?
A. Well, in the beginning, as I mentioned before
I left the first time, I was kind of a consultant to
it. I was kind of keeping in touch with it but not
participating directly because it was a microbiology

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project --
Q. Sure.
A. -- in that point in my career at Philip
Morris, the last year before I left the first time, a
few a hours a week.
When I came back, fairly soon after I came
back, because that program was not doing well, I
started to do some side experiments and got more
involved, even though I really shouldn't have done
them, but then showed that data to my manager and
director, Dr. Farone.
A decision was made, based upon that work,
that that program needed to change, and I was actually
assigned to take over that project.
So for the next couple of years, or whatever
it was, I spent full time -- almost full time every day
on that project.
Q. So it was an important project for you?
A. Not just for me, for the corporation.
Q. All right.
A. The Philip Morris project, it was important
to the corporate entity.
Q. What I meant is, you were really vested in

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24 the project personally?
25 A. Personal time is -- was one of the
jobs I had

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1 at Philip Morris.
2 Q. You cared about it, didn't you? You
cared
3 about your work?
4 A. Well, we all, I hope, care about our
work,
5 yes.
6 Q. All right. So if you were spending
almost
7 full time on it, you would -- you obviously
wanted it
8 to succeed; did you not?
9 A. I wanted it to succeed, and it did
succeed.
10 Scientifically, technically it was a success.
11 Q. We're going to get to that, but I
want to
12 make sure first that the jury understands what
it was.
13 And I'm going to try to describe it, and if I
fail in
14 my simple way of trying to describe it, maybe
you'll
15 help me out. Okay.
16 Now, what it was is, there are
microbial
17 agents -- did I say microbial right?
18 A. That's good.
19 Q. That's pretty good. That's a good
start.
20 That naturally occur in tobacco;
right?
21 A. Because they're in the ground.
They're soil
22 micro-organisms. They're in the dirt, and
they wind up
23 on the plants.
24 Q. And despite all that we've been
talking about
25 for many weeks, even months now, tobacco is
still just

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1 a plant that grows from the soil; right?
2 A. The tobacco plant itself, before
anybody
3 touches it, yes.
4 Q. That's right.
5 A. Yes.
6 Q. So when it grows from the soil, it
absorbs
7 things from the soil?
8 A. Yes.
9 Q. So these microbes, the idea beyond

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using the
microbes, as I understand it, is that microbes -- do
you remember when the computers first came out and they
had like Pac Men?
A. Yes.
Q. Do you remember that?
A. Yes.
Q. Microbes are like Pac Men, right; they would
eat the nitrates?
A. Right.
Q. I would draw this, if I could.
A. No. I understand it. Yes. They utilized
nitrate as part of their energy system.
Q. Okay. And the evolution here is that -- that
the process that you scientists were involved with was
to evolve the nitrates, with an a-t-e-s on the end,
into nitrites; right? I mean, this is a successive

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process, right?
A. It's a cascade of events.
Q. Cascade of events is a good word.
So the first part of that cascade of events
was to take the nitrates, and then they would go into
nitrites, and then it would cascade further into
nitrogen oxides, right, and then the last event would
be into nitrogen gas, which just kind of -- what would
be a good word, vaporize?
A. Basically. Just go off as gas.
Q. Okay. So if the system works, if the system
works, the great thing about it is that you get the
little microbes, who work and digest the nitrates and
start this cascade of events going into place, so that,
at the end, you kind of turn everything into nitrogen
gas, which blows off, and it's a great success, right?
A. Yes.
Q. Now, prior to the time that you began work on
this process, Philip Morris actually did have a process
for removing nitrates; right?
A. Yes.

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Q. And that would be the crystallization process?
A. Yes. At Park 500.
Q. And the concern -- and Philip Morris' concern

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was that while crystallization -- and you described it earlier this morning, Doctor -- while crystallization did get rid of a fair number of nitrates, it didn't get rid of them all; right?
A. Correct.
Q. And what percentage do you think they --
A. I honestly don't remember. And I think it varies quite a bit, which I think is another thing they didn't like, because it wasn't consistent. It also didn't get rid of the nitrite in between, one of the other things. They wanted to improve it.
Q. They wanted to improve it?
A. Yes.
Q. Because they were trying to get rid of the nitrites, and this process that you worked on very hard and very well, I'm certain, was intended to do that. It was to do a better job.
A. Yes. It was one of the several attempts that were being evaluated by the company to do this.
Q. Okay. That's fair enough.
So now, this -- the intent here was to have a commercial process, and what I mean by commercial process is one that you could put and work on the production line in the factories so that it would -- it would work in the actual production of commercial

cigarettes; correct?
A. Yes.
Q. And for something to be used in that kind of an application, where you're going to actually take it

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and put it on the production line, the process does have to be controllable; does it not?
A. Yes. And, again, the production line, in this instance, was at Park 500.
Q. I understand that.
A. It's important to know that it wasn't the manufacturing center.
Q. Park 500 was the place where reconstituted tobacco leaf was being made; right?
A. Yes.
Q. So, since that reconstituted tobacco was being used in lots of Philip Morris products, it was important to be able to put it into a commercial application, and you understood that; right?
A. Yes. Uh-huh. That was one of the goals of the project, to make sure that it worked.
Q. Sure. Sure. And if it wasn't controllable -- and I want to talk a little bit with you about what controllable meant -- if it wasn't controllable, then you couldn't use it in the commercial application; right?

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A. Right. And that's exactly what we had to prove in the laboratory before anyone would allow us to do anything else with that process.
Q. And, in fact, you got to the point not only where you proved it in the laboratory, where you got it going, but you -- you built a pilot plant for it; right?
A. Yes.
Q. Okay. And a pilot plant -- just so the jury knows, a pilot plant is just like a -- what would you call it, a mini --
A. Small factory.
Q. A small -- it's like a miniature factory?
A. Small, not the size of the room, but it's not the size of the whole production center.
Q. Right. It cost a lot of -- a lot of time and money to make, but it's not the whole production thing.

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A. Right.
Q. And, in fact, a lot of time and money was being spent on this process; correct?
A. It was very important to the company.
Q. Right. Very important to the company.
Now, some of the things that have to be controlled when you're using these microbial agents are the temperature at which the bacteria are held; would

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that be one?
A. Yes.
Q. And the time -- the time component of holding it. And occasionally in the laboratory, you would run into problems, would you not -- and I'm not suggesting that you didn't get past them, but you'd run into problems that the -- the little --
A. Guys.
Q. -- Pac Men, the little Pac Men or bugs, they would start eating the nitrates, and then they'd stop.
A. As in the development of any new process, you always are trying to work out problems that come up while you're trying to finalize that process and develop it, yes.
Q. And when that happens, sometimes you'd wind up with a build-up of nitrites; right?
A. Sometimes, yes.
Q. And, of course, that's the last thing you wanted to have happen was for nitrites to build up?
A. Absolutely.
Q. Okay. So, you had a number of years of experimentation, and you got to the point where you were in the pilot plant with it, and you would get some very low nitrogen compounds; right?
In other words, you would get it working,

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you'd get that thing working in the pilot plant, you know, where the system was, to use your word -- I thought was a good word -- cascading the way you wanted it to.

A. Yes. The process in the laboratory, before it went to the pilot plant, when it was scaled up in these fermenter vessels, about this big, many of them, ran for months, and typically the target was zero nitrate -- zero nitrite. Everything gone to gas. And there was zero, as far as we could measure it.

Q. Okay. But while you were in the laboratory, you would occasionally have problems with this, what I call the start -- the start-up and stopping, and you can't have that in a commercial application; right?

A. Until we could learn to control that better, in the beginning, yes.

Q. Now, were there also, am I right, Doctor, there were also problems -- there was an odor problem with some batches of the -- of what I'll call the SEL?

A. Uh-huh.

Q. The strongly extracted liquor that the microbes would be in.

You would have some odor problems with that; isn't that right?

A. Yes. Occasionally.

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Q. And the company worked with its flavor person -- is that Howard Speilberg?

A. The chief flavor chemist of the corporation, world-wide, Howard Speilberg.

Q. All right. And the fact that Howard Speilberg was brought in to try to deal with the odor problem also showed how important --

A. He wasn't brought in to deal with the odor problem. He was a natural part of the team that was overseeing the development of the project.

Q. Okay. But odor was a problem, and

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one way to
deal with odor is to use flavors; right?
A. Possibly, or to develop the process better so
you don't --
Q. Don't have the odors?
A. -- don't have that problem very frequently,
which is one of the things we did do.
Q. Now, the odor -- part of the odor that was
associated with the use of this bacteria was a smell of
like rancid butter and fecal matter; right?
A. Well, most people identified it as like
smelly socks, gym socks.
Q. I don't know which is worse.
A. I don't know either.
Q. But it was not a pleasant odor, right?

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A. It could be a fairly strong, kind of old
locker room, athletic sock kind of a smell, that was
identifiable in certain kinds of organic acids that can
be made.
Q. And things like odor, they are considered
part of what we would call subjectives; right?
A. Oh, yes. Product acceptability can be
dependent upon something like that which, again, we
were very aware of during this whole project.
Q. Now, I want to show you just a few of the
reports that were being issued during this period that
were dealing with some of these subjects.
A. Okay.
Q. So, I'm going to start, and I think I'll
start with Defendants' Exhibit 36327. I'm sure you're
familiar with these reports.
Doctor. (Handing)
A. Thank you.
Q. You're welcome.
Doctor, I've handed you Defendants' Exhibit
036327, which we'll mark for identification Defendants'
Exhibit 036327.
(Defendants' Exhibit 036327 was marked for
identification.)
Q. And it's dated March 19th, 1982, and

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what I'd

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like you to do, Doctor, is this was -- this was a report from Mr. Gomes to Mr. Burnley.

Maybe you could tell us who those gentlemen were.

A. Roger Gomes, Jay Gomes -- to tell you the truth, I don't remember Gomes. The names are familiar. But to tell you the truth, it's been so long, I forget what people were doing in certain stages. It's been a long time.

Q. I understand that.

But this was an NOD project status report; right?

A. Yes. I think it was an early one, and, again I'm not sure of the exact dates. It's possibly before I got involved with it. I don't know.

Q. Well, the date here is March 19th, 1982. Had you returned?

A. Oh, yes. I didn't return and then immediately go into NOD. It was -- I don't remember how long, a year or so.

I just notice I'm not on the distribution list, which is kind of interesting.

Q. Yes. So it may be that you hadn't started back on the project yet. It's possible?

A. It's possible. I mean, that project had been

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going on since the late '70s --

Q. Yes.

A. -- under different people and different stages with different organisms, different micro-organisms being used to do this work, when it didn't work very well. That's why I was assigned the project, to help find out what the problem was.

Q. So if one set of micro-organisms didn't work, they would try another set to see if that worked

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10 better?
11 A. Well, there was a set that was there, the
12 ones that naturally occurred on the tobacco, but within
13 those organisms were many, and in the beginning, people
14 thought it was one.
15 In the early years of the project, everyone
16 was focusing their attention on one or two organisms
17 that did part of the work and sometimes went to gas and
18 sometimes didn't and sometimes did and sometimes
19 didn't. And it was causing tremendous confusion, and
20 it turned out to be not the only organism. So this may
21 have been during that period.
22 Q. Okay. So just take a look at the first page,
23 under project status.
24 A. Which page is this?
25 Q. Right behind the cover page.

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1 A. Okay.
2 Q. And it says: Object: To present an overview
3 status of the NOD project for management review.
4 And it says, you know, where the project is
5 as of that point in time.
6 A. Okay.
7 Q. And it says some favorable things,
8 denitrification by bacterial fermentation has been
9 achieved in the pilot plant.
10 You follow along with me --
11 A. Yes.
12 Q. -- under the numbered paragraphs.
13 And then when you get to 3, it says
14 consistent denite -- I'm sorry -- consistent
15 denitration rate results have not yet been achieved in
16 the pilot facility.
17 Now, is it your recollection when you joined
18 the project, as of that point, they had not been able
19 to get consistent denitration rate results?
20 A. I see now this was actually done in the pilot
21 plant, which is even more interesting to me since I
22 wasn't on the distribution list, but, nevertheless,
23 that was partially true, because actually over

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the
24 three months it was being run, except for a
few -- I
25 think a few occasions, one or two, where the
incoming

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1 SEL, the material that bacteria were gobbling
up the
2 nitrate in, poisoned the fermenter.
3 I mean, it came in and everything
stopped
4 because of the SEL that was made at Park 500,
which was
5 a problem inconsistent in the ways in which
SEL was
6 made, except for a few of those occasions and
one power
7 failure, as I remember, the process, as it ran
faster
8 and faster and more efficiently and was
running
9 basically at zero nitrate, nitrite.
10 So, yes, the statement that was
inconsistent
11 is partially true, but not really reflective
of what
12 was going on.
13 Q. Okay. Well, this writer thought
that that
14 was true as of this point in time; right?
15 A. Yes. Again, it's interesting.
There was an
16 engineering company associated with this
called Pedco,
17 Philip Morris hired an outside expert,
engineering
18 company that did this kind of stuff, and they
were part
19 of this whole project. And during this whole
period,
20 they were -- they originally predicted they
didn't
21 think this would work early on in the lab, and
then
22 became believers by the time it was scaled up
in the
23 laboratory.
24 And one -- one of the proponents
said, let's
25 go to pilot plant and engineer it. They
worked with

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1 Philip Morris' engineers to help build the
pilot plant.
2 And during this period, they were very happy
with the
3 way this was running.

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Q. In fact, it says under Paragraph 4, successful process start-up has been repeated in the lab several times, but only once in the pilot plant.

Do you see that?

A. I don't think that's accurate, and I wish someone had shown it to the people who were actually conducting the work, and it would be nice to have that input from the people on-line doing the work.

None of these people who were on this distribution list had anything to do with running that particular project.

Q. Well, Mr. --

A. That doesn't ring -- I don't think that's perfectly true, because to start the whole project in the pilot plant, actually start the process running, we had to started it once. There were a couple of planned shut-downs because we needed to test -- in the manufacturing center, one of the things you have to do is sometimes you have to shut down equipment to fix it, clean it, to make sure it's going to work next week.

So we purposely would shut down the process so we could show we could start it up again. That

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process was patented by Philip Morris. That's one of the patents issued, was this process of saving the material that you just did, using it as the start-up material again.

And we showed we could do that virtually every time we did it.

So during the three or whatever months in the pilot plant, my recollection is that it was started up on a number of occasions. And since it did run for three months, with a couple of failures because of the SEL coming in, or a power failure that happened one weekend, we had to have started it up again

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anyway.
So, I don't understand that statement.
Q. Okay. That's okay. But, Dr. Uydess, you don't -- you have no reason to think that Mr. Gomes would be trying to mislead Mr. Burnley; would you?
A. Oh, no, not intentionally. I would be very surprised at that.
Q. All right. And when you look at -- Mr. Whidby is one of the people who got a copy of this. Was he involved with the project at all?
A. Dr. Whidby was, I guess, at the time my manager.
Q. So you would expect that if he thought this was wrong, he would have said something about it;

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right?
A. Since at this period in my career -- I have to go back a little bit.
During these several years of this development work, aside from my -- as I talked about my meeting with Dr. Gullotta, Dr. Farone, Cliff Lilly, who I think may or may not have been Dr. Lilly -- Mr. Lilly and I would meet virtually every morning at about seven o'clock, sometimes with Howard Speilberg, and sometimes with Jerry Whidby, to discuss the process as it was going from the lab to the pilot plant, but especially in the pilot plant.
Q. So these would be people that you would feel confident would know what was going on with this project, and can you give me their names again?
A. Cliff Lilly.
Q. Cliff Lilly?
A. Almost every morning. Cliff Lilly, Dr. Farone, myself, sometimes also right after that, Jerry Whidby, sometimes Howard Speilberg. Again, during which time we would review what had gone on the previous day.
I would assume if somebody had some

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concern
24 or hesitation, would have brought it up
immediately,
25 because they knew what we were going towards.

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1 You're talking about a major capital
2 investment by the corporation to do this
project. We
3 all were.
4 Q. Probably millions of dollars?
5 A. Yes. Tens.
6 Q. Tens of millions of dollars?
7 A. Maybe more. So we were all very,
very
8 careful about the results, the quality of the
process,
9 being sure as best we could, identifying areas
where
10 there were problems and trying to overcome
them.
11 And this was an ongoing part of this
process.
12 Q. All right. Item Number 6 on here
says,
13 excessive levels of organic acids are
unacceptable
14 because of the odor and taste they introduce
to the
15 product.
16 A. Uh-huh.
17 Q. And then they go on to say:
Subjective
18 testing is in process on sheet runs made with
SEL
19 denitrate in the pilot plant during February
1982 to
20 determine acceptable acid levels.
21 My question to you is this: The
question is,
22 the odor that you mentioned earlier, I think
you called
23 it the smelly sock odor, was that a function
24 exclusively of the organic acids?
25 A. Would you repeat that, please?

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1 Q. Yes. I'm sorry if it was a bad
question.
2 A. No. I was reading just a little bit
to see
3 where --
4 Q. The odor that you and I had talked
about just
5 a minute ago.
6 A. The off-smell --
7 Q. The off-smell, whatever.
8 A. -- that occasionally occurred?
9 Q. Right. Was that exclusively a

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function of
10 the organic acids?
11 A. One of the major contributors were some
12 organic acids; one being this thing called butyric
13 acid, which is this smelly-sock type of smell.
14 I need to point out that that also
15 happened -- it happened at Park 500. That same
16 occurrence happened there independent of
17 denitrification process.
18 Q. Okay. Now, I want to show you another report
19 that follows this report. And this one you'll remember
20 because it's from you.
21 So if I --
22 A. Again, I'm a little confused about when this
23 actually -- I see this sentence, some of this material
24 was made during a denitrification run in the pilot
25 plant in February of '82.

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1 There had been earlier studies on kind of a
2 fixed reactor with this older process, which didn't
3 work real well all of the time.
4 Q. Right.
5 A. Which, again, is what I think this is talking
6 about.
7 Q. This is dated, the one we just looked at that
8 you have in your hand is dated March 19th, 1982; right?
9 A. Yes.
10 Q. Okay. Now, let me show you, if I may --
11 A. Can we?
12 Q. Yes. Please.
13 A document that has been marked for
14 identification or is being marked for identification as
15 Defendants' Exhibit 036328.
16 Doctor. (Handing)
17 (Defendants' Exhibit 036328 was marked for
18 identification.)
19 A. Thank you.
20 Q. Now, if you'll take a look at the -- I know
21 you can't read the cover page -- I can't either, but
22 the second page refers to a special report. And is
23 that your signature?

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24 A. Yes. It appears to be, yes.
25 Q. Okay. And this report is dated August 29th,

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1 1983.
2 Now, when is it, Doctor, that this report --
3 that denitrification -- naturally-occurring
4 denitrification was, to use your words, shut down, or
5 counsel's word?
6 A. Again, the dates are kind of fuzzy to me.
7 The final process, the lab process that we all
8 developed at that time, went to the pilot plant, I
9 believe ran over that summer, June, July, August, if
10 that was '83, then it was shut down right after it.
11 Q. Okay. Now, would you take a look at -- by
12 the way, this is -- it says, Ian Uydess --
13 A. Yes.
14 Q. R.L. Dunn, did he work with you on the
15 project?
16 A. Yes. He was one of the team, but had been
17 there all of the time and actually did a tremendous
18 amount. He was -- he managed the evening shift when we
19 had evening shifts and really had been just a long-term
20 player in the development process.
21 Q. Okay. And it says approved by J.W. Whidby.
22 That's Jerry Whidby that you mentioned before?
23 A. Yes.
24 Q. Was he your immediate superior?
25 A. Yes. At that period of time he must have

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1 been. That's why he signed the report.
2 Q. Now, if you'll go to the, I guess what would
3 be the page that says, Introduction. It's the page
4 right before the drawing.
5 Are you with me there?
6 A. What page is that, again? The page right
7 before the drawing of the bacteria?
8 Q. Yes, sir.
9 A. Okay.
10 Q. Now, in the first sentence of that

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second
paragraph, you write: Over the past six months, we have made significant advances in our understanding of the major operational and process parameters of NOD, and then there's a parens, 5 comma 6, close parens.

What does that refer to?

A. That must be referring to other reports that somebody had written.

Q. Okay. Then it goes on to say: However, one of our greatest problems has been in gaining a better understanding of the critical parameters regarding seed storage and a consistent process start-up.

And then it goes on to explain that. Do you see that?

A. Yes.

Q. And you concluded that paragraph by saying:

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Although considerable light has recently been shed on this topic as a result of the recent experimental observations of the NOD laboratory and Dr. Hempfling, et. al., with a 4, a complete understanding of the relationship between the relative efficiency of denitrification and the variability of our SELs lies somewhere in the future.

Is that what you were writing in -- let's see, what date is this -- August -- the end of August, 1983?

A. Yes.

Q. And you hoped to develop a complete understanding of the relationship between the relative efficiency of denitrification and the variability of the SELs, did you not?

A. Yes. We hoped that, with continued experimentation, we would learn more about the process and it would work better, as a result of that.

Q. Where was Dr. Seligman in this hierarchy at the time?

A. He had been the vice president of

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R&D. At
that point in time, I don't think he was any longer. I thought he was --
Q. But he was senior to you?
A. Oh, yes. When I came to Philip Morris, he

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was Dr. Farone's immediate supervisor, the vice president of R&D, and several levels above myself.
Q. Okay. Did you know at that time who Dr. Gaisch was, G-a-i-s-c-h?
A. Yes, I did. I didn't know him at the time. I understood he was a researcher in Switzerland at Philip Morris's R&D headquarter there. Helmut Gaisch.
Q. Helmut, yes. You're absolutely right.
Was he a pretty senior scientist?
A. I really don't know what level he was.
Q. All right. Now, I'd like to show you a letter from Dr. Gaisch to Dr. Seligman, just a couple weeks after this report.
A. Excuse me. May I just -- I mean, I know we just went through the beginning here that I pointed out that something needs to be improved.
I don't recall this verbatim, this report --
Q. Sure.
A. -- but it seems like we go on to discuss that we evaluated and investigated this and maybe made some inroads into this problem, so it wasn't like it didn't work; we're going to figure it out in the future. I think that was the lead-in to the work in the report --
Q. I understand.

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A. -- which then went ahead and evaluated, modified what we were doing, and actually came up with, I guess, some solutions, some improvements.
But, anyway -- go ahead. I'm sorry.

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Q. That's perfectly fine.
A. Where are we now again?
Q. I'm going to show you a letter from Dr. --
A. May I put this aside?
Q. You may, certainly.
THE COURT: All right. We'll take a break, folks.
We'll be in recess, folks.
(A brief recess was taken.)
THE COURT: Okay. Let's get the jury out.
THE BAILIFF: Bringing in the jury.
(The jurors entered the courtroom.)
THE COURT: Be seated, please.
Let's resume.
MR. HEIM: Yes, sir.
BY MR. HEIM:
Q. Doctor, I don't recall whether I -- before we took that break, did I hand you Defendants' Exhibit 036328?
A. The letter?
Q. Yes.

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THE COURT: This?
THE WITNESS: No, I don't have that.
But before we do that, can I go back a second, because you presented me with a document and you made some remarks about the introduction, and I didn't really have a chance to review that document.
BY MR. HEIM:
Q. Sure. We'll go back.
A. Can we just go back for a moment?
Q. Okay. We'll do that.
You're referring to questions that I asked you; right?
THE COURT: Which document are you talking about? There is a number on the bottom of it.
THE WITNESS: I need my glasses.
This is document 036328, which was my internal report. Where is the date? Oh, August 29th, 1983.
And you introduced it; had me read something from the introduction.
BY MR. HEIM:
Q. Yes.
A. Where I was saying, there are some things

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that need to be looked into in the future, that there's some problems here and there, and we definitely need to

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look into it.

Q. Sure. And you wanted to make a point about that document?

A. Yes. I started to make --

Q. Why don't you go ahead and do that. That's fine.

A. I started to make it before we took a break, just so the Court understands.

That was the introduction to this document that I haven't seen in --

Q. Many years?

A. -- a long time.

When you do an introduction to a scientific document like this, you want to give the state of affairs as of the time that you were going to start to report this work. And you quite properly showed that in my wording, there were some areas that weren't working real well, we were concerned about, that needed to be looked into in the future. Well, the future is what was done in this report.

I just want the Court to understand that although those questions were raised during that point in time during the development of the process and we didn't have control over certain things and we were a little concerned about it, we went ahead and

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investigated those things. And I made sure I read the rest of the report, the conclusions and the results.

And I don't want to take the Court's time because I know we're limited here.

Q. That's all right, Doctor.

A. But what this report basically reports to my management is that we solved some of those

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problems,
some of the major problems, and things were looking
pretty good, and then identified some other things that
needed to be looked into.
And this is part of the scientific process.
Q. Of course.
A. I realize you introduced this to show that
things were not working well, but, in fact, the work of
this report solved many of those problems.
Q. In fact, didn't I, Doctor, say that while
there were some successes and some things were working
well, there were still some problems, and obviously
this report shows that there were some successes and
there were still some things that you were still
looking at; right?
A. I just didn't want to leave it with my
statement that there were problems that we wanted to
look in the future and not have that understood that
they were solved, and many of them in this report.

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Q. And you were trying -- when you made that
report, you were trying to inform your management, as
well you could, as to your view of where the project
was at that time; right?
A. My responsibility was to report to my
management and the corporation everything I understood
or knew about how that process worked, where we could
take it, where we couldn't take it, doubts I might
have, and explore those until we had enough data to
make a decision, enough information.
Q. All right. And the decision -- and so I
think what you did is -- I think you answered my
question by saying, yes, that you were trying to fully
inform your management of every aspect of it that you

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thought was material to making a decision; right?
A. Full disclosure.
Q. Right. Okay.
Now, and that's because management has to make the -- has to make a decision about something like this; it involves an awful lot of money; right?
A. And it's my responsibility, as a scientist, if I do my job properly, to make sure they have all of the possible information, accurate information, that I can provide them with.
Q. And management, when it -- when it makes a

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decision like this, people who are above you, the managers who have to make this decision, they have to look at things like what the prospect is for success; right?
A. Absolutely.
Q. They have to look at what it will cost?
A. Which we did.
Q. And they have to look at whether or not the process, in their judgment, based on the reports that have been provided to them by the scientists is controllable in the commercial setting; right?
A. Right. And this is the process we went through, with, again, the management team being, not me, Dr. -- well, Speilberg, the chief flavor chemist of the corporation, Mr. or Dr. Lilly -- he became a doctor in the middle of all of this time.
Q. He was the corporate scientist?
A. He was the corporate principal. He was the highest-ranking corporate scientist who not only wanted to make sure that it worked, that it was good, but that it was his -- what do you call it -- his reputation.
His function at Philip Morris' R&D was to help manage high level corporate projects. And if he

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24 was standing behind that project and saying to New
25 York, this is something we need to do, to go on, it's

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1 not that he just wanted good science; the bottom line
2 is, it better work. So, he was there to make sure it
3 worked, as did Bill Farone, as did Howard Speilberg, as
4 did others.
5 Engineers were also involved. And again as a
6 safety check, an outside independent engineering
7 company.
8 Q. So, all of these people, their opinion on
9 this subject of naturally-occurring denitrification,
10 and especially Dr. Lilly's, would be important to
11 management in making a decision whether to implement or
12 not; right?
13 A. And to, if at any point during the
14 development of this thing, if they felt it wasn't going
15 to go where they wanted it, to stop it there.
16 Q. And you would expect that management, when
17 they got to the point where they were going and made
18 their decision would -- would want to talk to somebody
19 like Dr. Lilly, especially Dr. Lilly, a principal
20 senior scientist; right?
21 A. And Dr. Lilly reported to his senior
22 management, which sometimes wasn't in Richmond, it was
23 in New York, his views of how the program was going.
24 Q. And you would expect that senior management
25 would talk to their senior scientific people about

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1 their views of the subject, as well; right?
2 A. You mean information back down.
3 Q. Well, management has to make a decision about
4 whether to do something like this, they're going to
5 talk to their senior scientific people to get their

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views as to whether or not it's something that can be -- that will work; right?
A. Which is why the team of people involved in this project -- it wasn't just Ian and his lab. I mean, this involved the top engineers that built the manufacturing center. It involved the top flavor chemists who have to take care of a lot of things. It involved all of the principal -- key principal, top level technical people in the company.
Q. Let me show you another document. Since I only have two here, I thought I handed it to you before we took our break, but maybe I didn't.
THE COURT: 6326.
MR. HEIM: Your Honor, it's marked as 036326.
THE COURT: Yes. He can look at this copy.
MR. HEIM: If you have one -- I have the one for the witness.
THE COURT: Okay. Here you go. Mark it for identification.
(Defendants' Exhibit 036326 was marked for

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identification.)
MR. HEIM: You have one. I did hand it out.
Okay.
BY MR. HEIM:
Q. Now, Doctor, you identified who Dr. Seligman and who Dr. Gaisch was, the senior scientists in Switzerland.
And this document dated 11 -- I'm sorry -- the 12th of September, 1983 is Dr. Gaisch essentially saying that he reviewed the NOD paper, and it's his -- his statements about how -- what he thought as of that point in time.
And I'd like to go over that with you.
He wrote: I had good luck at the NOD paper, which contains a lot more information that had been

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compiled before. In the introduction, the authors say, for example, quote, a complete understanding of the relationship between the relative efficiency of denitrification and the variability of our SELs lies somewhere in the future.

That's referring to the -- your sentence in your report; right?

A. In the introduction of the report.

Q. To your report?

A. Which was heading -- it was old news.

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Q. I know.

A. Okay.

Q. But that's what -- that's the reference that Dr. Gaisch is making.

And then he says: I think this sums it up. There are many conditions outlined, which must be observed, but they are not terribly well-defined and seem, to me at least, not easy to be controlled experimentally.

Now, I gather, you disagree with Dr. Gaisch's view of what you were -- what your report was conveying; is that right?

A. He's talking about this introductory sentence and agreeing, scientifically, that, yeah, we need to look at a lot of things if we're going to go ahead with this process. That's what he's saying, which is what we did.

And if we were to -- I didn't want to read the last two pages of the report, but it mentions a success that had to do with some of the questions that he's raised.

Q. Well, let's go on with what Dr. Gaisch thought.

A. Okay.

Q. He said: The most important feature of any

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industrial process is its controllability. Parameters which spring to mind are temperature, pH, specific nutrients, et cetera. I know that the process runs, and I know that biochemically the interactions between two cultures are rather complicated. Where I see a problem, but I might be wrong, is how to keep the process on the rails.

Now, you understand what he's referring to about how to keep the process on the rails? He means how to keep it working in a commercial setting; doesn't he?

A. I guess that's what he meant. I never discussed this with him, so no. I assume he meant to keep the thing working.

Q. And then he goes on to say: For example, what do you do if the start-up does not happen, or what do you do if suddenly you accumulate the wrong metabolites? However, the people who work with the system must have a feeling of how well they can control it. They are the only ones who can really judge.

Now, the people that work with the system are the group that you referred to several times now; right?

A. The Richmond, the U.S.-based project team.

Q. Right. But this Dr. Gaisch is saying, as he

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looks at it and as he studies the report, he has real grave doubts about whether this use of microbial agents in an actual commercial setting, despite all of the investment, is actually going to work so that it can be controlled and it can be used commercially; is that --

A. I don't agree that he said that at all. I don't see where he had grave doubts, and I

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don't see
where he wrote that he doesn't think this thing would
work ever.
He's raising scientific questions which I
think, if you compared it to the report I'm talking
about, raises the same types of issues which were --
some of them addressed and some of them put off to the
next group of experiments.
You have to also remember, Dr. Gaisch -- I
went back a couple hours -- there were two biological
projects looking at denitrification, the European one
and U.S. one. We were competing in a way to see who
could come up with the best process. They used yeast;
we used micro-organisms.
Q. So you think --
A. He was attached --
Q. Excuse me. I'm sorry.
A. -- to the yeast project, so he had a vested
interest and rightfully so.

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He was working on the yeast project. So he
was making what I think are appropriate -- again, I
didn't see this back then, which is interesting, but he
was making appropriate remarks, which happened to be
the same things I said in this report, which we had
read, and that we addressed.
And then went on to continue to address, step
by step, like you kind of do in any project, until we
had gotten to the point where we had enough of those
things in hand, understood them well enough, that we
could scale this thing up,
And there were several pilot plants, so we're
getting confused about what pilot plant we're talking
about. There was the pilot plant, but it got totally
re-engineered after a lot of this other work I'm
talking about was done and refined so this

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thing ran.
So to bring up questions that might be okay that were done in the middle of a project while this is part of a normal process of the project, I just don't understand where you're kind of going with it.

Q. Doctor, keeping the process on the rails was something that had to happen before you could do a commercial application; right? You had to know that each time you did this, it was going to work; otherwise, you couldn't do a commercial application of

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micro-organisms eating nitrates; right?

A. As best as possible, within the context of the process -- and again, Park 500, which is where this would be, where they squish out the hot water extract of the tobacco and make this paper thing and put it all back and it goes into tobacco, that process, for all of the ten years that I was at Philip Morris, didn't run the same way every day, had problems, smells, odors, taste, got shut down, fixed.

I mean, that is the way -- that was the best we could do at the time.

In the manufacturing center, where these things get used and are made into billions of cigarettes, there we wanted to make sure -- engineers, not me, wanted to make sure those things ran 24 hours a day, every day of the year.

But, I mean, this is not like we were going to put this -- if you're making a case that here was a process that worked, didn't work, worked, that was true in the beginning, not at the end. You're taking these facts from the middle of the process.

And it was also not going into an environment where it had to work every second of the day. We would have loved it if it did. It was going into an environment where the resident process worked

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most of

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the time; it would be part of that process, and it would help the company do what it wanted to do.

Q. Doctor, did I mistake your testimony that you thought that the project actually got shut down somewhere around the time -- the end of 1983?

A. I'm not sure about the years. But after we ran the final, what I knew was the final pilot plant project, with the totally re-engineered system where the outside company, Pedco came in, helped us scale it up in the lab, was there as a third party to make sure we weren't making some mistakes because they knew about this stuff --

Q. Doctor --

A. Excuse me.

Q. Excuse me. I didn't mean to interrupt.

A. -- were there to make sure that even though Cliff Lilly was attached to it, Jerry Whidby and Bill Farone and Howard Speilberg and a team of people there were in my lab, 10, 15 people working in my lab day and night, because we didn't do this from eight in the morning to five, Philip Morris, and shut it down. We ran it over the weekends for many months.

COURT REPORTER: Can you slow down?

A. (Continuing) We ran this for long periods of time, making sure that we understood what was going on.

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That was all our responsibility. And we had multiple checks to do that.

And Dr. Gaisch's remarks, again, to end this, were appropriate at the time but wasn't the end of the project.

Q. Doctor, you said that you were unaware of

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Dr. Gaisch's views as they were communicated to Dr. Seligman in September of 1983, until I showed you that letter; is that right?

A. I do not remember ever seeing this letter before.

I mean, I don't remember it.

Q. Now, and I gather, you're not aware of what communications Dr. Lilly had with New York on the subject of the commercial controllability of this process, in and about this same time?

A. Before we actually got a handle on the whole process and can make it work well?

Q. Well, my question is, do you know, of your own personal knowledge, what Dr. Cliff Lilly was saying to upper management about the commercial controllability of this process?

A. I wasn't always with him when he had these discussions. I know that while I was in charge of that project for the last two years or so that it was

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running, that whenever Cliff talked to me about it or we presented material to the higher level management of the company, that within the caveats that we're talking about, that there were some things we're working on and we think we can solve them, that he was a proponent of it.

I mean, I couldn't imagine him allowing us to spend company money, tie up 15, 20 people in our department, 50 or 100 people around the company to do this if he had a major concern. I mean --

Q. At some point you have to make a go or no-go decision based on what you believe is the right thing to do at the time; right?

A. Yes.

Q. I want to talk to you about cadmium for a minute, because you made some reference to cadmium

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earlier in your testimony.
I'm shifting -- I'm shifting gears. Okay.
And I think you said, with regard to cadmium,
that -- that that was something that you had gotten --
you had gotten started, but it wasn't anything that had
gotten to a point where you could actually apply it in
a -- in a finished way at the time, that, as you
understand it, that project was shut down?
Is that right?

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A. Would you repeat that again? I'm sorry.
Q. Well, it was a bad question.
A. You lost me right near the end.
Q. Yes. I think I lost me in the middle.
A. Okay.
Q. You did work on cadmium; right?
A. I was asked by the company, by my management
to kind of, as we did in NOD, with -- because you guys
were successful in this other project, we would like
you to look at this new project, cadmium, that other
people had been involved in.
Q. All right. And just so we all remember,
cadmium is in the soil; right?
A. Yes.
Q. And cadmium gets into the roots of the plant?
A. Yes.
Q. And cadmium is a -- is a heavy metal?
A. Metal ion, yes.
Q. And it's a good thing to get rid of it?
A. Only because when you ingest the smoke into
your lungs, these particles settle on the surface of
your lungs and become a major irritant. Can cause
problems. It was known.
Q. That would be a good reason to get rid of it;
right?

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A. Oh, yes.

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Q. And at the time when this project, as you understood it, was cancelled, a technology had not been fully developed at Philip Morris that was able to extract the cadmium from the tobacco leaves, right?
A. We were given --
Q. I think that's what you said earlier.
A. Well, we were given the project to find a solution. So, no, in the beginning of the program, we didn't have the solution. We were working towards it and making major gains.
Q. You had what you described as the first foothold in it?
A. Major foothold, yes.
Q. Now, do you recall a gentleman by the name of George Wagner at the University of Kentucky?
A. Not really. I may have possibly -- was he an associate of Don Dougal's?
Q. Well, do you remember that -- that Philip Morris was using a consultant in this area of cadmium removal?
A. I'm not sure what wording you're talking about. I would have probably talked about -- we had a consultant for the cell and tissue culture work, which is where this cadmium program was placed.

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The company had other experts in the cadmium area that I did not deal with. I dealt primarily with Don Dougal, who was a cell tissue culture expert.
Q. Okay. So I guess my question to you is simply this. And I gather from your answer that Dr. George Wagner at the University of Kentucky doesn't ring a bell with you?
A. It was not someone I was conferring with during this project, no.
Q. Do you know whether Philip Morris had a consultant contract with the University of

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Kentucky and
12 Dr. Wagner to work on the subject of cadmium removal
13 from tobacco leaves?
14 A. I didn't know that.
15 Q. And so you don't know whether, after you
16 stopped working on cadmium extraction, a contract
17 actually went forward with an outside consultant to
18 work on this problem of cadmium in the tobacco? You
19 have no knowledge of that one way or the other?
20 A. All I knew at the time, because I asked
21 another individual who was in my management line, who I
22 reported to at the time, a gentleman named Bob McCuen,
23 kind of one day asked him, Bob, whatever happened with
24 the cadmium program? I was curious, did it ever go
25 anywhere, which I was interested to see if it went

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1 anywhere. And he said it never went anywhere, and
2 that's all I knew about it.
3 Q. Did you ever have a conversation with Jerry
4 Whidby about what happened to the cadmium project?
5 A. All I knew at the time until I left Philip
6 Morris in 1989 was that.
7 Q. Okay. So the answer is, you don't know one
8 way or the other?
9 A. I don't know. To my knowledge, no, it didn't
10 go anywhere.
11 Q. Now, I want to switch to the subject of
12 Dr. Gullotta's work for a few minutes. Okay.
13 Doctor, you testified earlier about some
14 work --
15 A. Yes.
16 Q. -- that Dr. Gullotta did with EEGs; do you
17 remember that?
18 A. Yes.
19 Q. Now --
20 A. We're leaving the cadmium?
21 Q. Yes. You now know as much about it as I do.
22 A. Well, I mean, I understand what

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you're trying
to show. But, again, if I worked for you at that time
and I had done this great work that you had me present
to people internally, and you decided it should go

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outside to someone else, you probably would want me to
confer and transfer what I knew to them, which never
happened. So I don't understand what relationship it
has with this guy.

Q. You don't know of personal knowledge whether
work that was done on the cadmium project was shared
with Doctor --

A. Wagner?

Q. -- with Dr. Wagner, do you?

A. No. They may have showed him a report. I
don't know.

Q. All right.

A. But, again -- well --

Q. Now, let's go to Dr. Gullotta.

The idea of testing smoke for a brain wave
response, the use of electrophysiology for this
purpose, that was -- that was -- the general concept
was well-known by the scientific community before
Dr. Gullotta started doing this work; right?

A. As bright as Frank is, and talented, he
didn't invent this whole area, no.

Q. All right. And I didn't mean to suggest that
he did. But I'm sure, you would expect that
Dr. Gullotta would use the prior work in the literature
on testing smoke for brain wave responses as a basis

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for going forward with his work; right?

A. You always want to know what's in the
literature when you start a piece of work.

Q. Okay. Good.

And you are aware that there was published
literature on this whole subject of brain wave response

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to smoke back at the time that Dr. Gullotta was doing his work?
A. Generally, there was some. Again, it wasn't my particular field, but, yes.
Q. In fact, there was a whole -- there was a whole published international symposium on the EEG effects of nicotine back in 1978; weren't there?
A. Oh, I don't know.
Q. You weren't aware of that?
A. There was -- in 1978? That's nice. That's good.
Q. You're not aware of that at all?
A. No. Frank may have mentioned that to me, and it may have been on his desk. But, again, no. This is 20 years ago, yes.
Q. When Dr. Gullotta was doing his work, you were -- did you say you were next-door to him, or did I get that mixed up? It was somebody else?
A. No. I was at that time, just before.

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Q. Where were you in relation to him?
A. I was on the third floor next to Behavior Research where he started. But sometime, and I don't remember when, when Caroline Levy, who was at one time in that group and moved and went to New York, there was some reorganization of space, and there were people in R&D moving around like you do, you move around offices, wound up on the fourth floor, because they wanted him to have a totally separate laboratory for his work.
So they built that laboratory on the fourth floor, rather than in with the rest of the stuff on the third floor, which is where Dr. DeNoble was and Bill Dunn and others.
Q. And I think you said this morning that Dr. Gullotta, in doing his tests, was testing for -- for nicotine response in the brain, and he was

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also
17 testing for flavor response in the brain;
right?
18 A. Yes.
19 Q. Okay. So, for example, he would
take a
20 vanillin compound, which was a flavorant, and
would
21 test to see whether people had a brain wave
response to
22 vanilla in his work; right?
23 A. Yes. They wanted an objective,
technical
24 measurement, scientific measurement that they
could
25 correlate to someone saying, yes, I like it
more than

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1 the thing I had before. And if they put a
little more
2 vanillin, I think it's called --
3 Q. Vanillin is how you pronounce it?
4 A. Vanillin is the chemical. It's
vanilla.
5 Q. It's vanilla?
6 A. They would do it that way so they
had a
7 measurement, not just what someone said: How
much do
8 you like it? A little bit more.
9 They had a measurement they could go
back to.
10 Q. They were trying to objectify it?
11 A. Yes.
12 Q. There had been published literature
on, for
13 example, brain wave response to what you get
in a cup
14 of coffee from caffeine; right?
15 A. Oh, a lot of things.
16 Q. Okay.
17 A. Sure.
18 Q. And he was looking at things like
citrus
19 smell and vanilla and nicotine and other
things?
20 A. Menthol.
21 Q. Right. He was doing it all. Right.
Okay.
22 Now, and he was actually able, as I
23 understand your testimony, to measure brain
wave
24 responses for different flavors and smells;
right?
25 A. He was able to measure a response
having to

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do with a nerve in the tongue or the mouth or the throat being stimulated by something like that, among other things that he was looking at, like nicotine, yes.

Q. And the interpretation of a flavor occurs in the brain, so you would expect to get an EEG response; correct?

A. Everything we do is interpreted in the brain.

Q. Okay. And you believed -- you believed that it was appropriate or not inappropriate for Dr. Gullotta to be doing his work; didn't you?

A. Oh, yes. It was, again, excellent work.

Frank took what was known in the literature -- and this is, again, something that Philip Morris did frequently, and one of the things I admired about the company, one of the things that disappointed me ultimately, why I left, had the capability to take what was out there, a technology that was at the forefront of its field at the day, bring it inhouse, and make a massive step up in a year, because they had the horsepower to do it, the talented staff, the money, the facilities.

And over a short period of time, they would take what the rest of the world did, and without the rest of the world knowing about it, would all of the

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sudden go, swoop, like this, and do work that no one else in the world that I knew could do.

Q. And, in fact, they had, I think you said -- I believe it was you who had said they had 600 people doing research and development work of various kinds?

A. When I first got there, around 600, 650. It varied a little bit.

Yes, they had -- not just in R&D. They had -- I don't know what the number of people

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in
Richmond was. They had a lot of talented people at
Philip Morris.
Q. And those talented people worked on lots of
different projects, like some of the ones you mentioned
this morning, expanded tobacco?
A. Yes.
Q. Right? And filtration?
A. Yes.
Q. Ventilation of filters. And NODs.
A. Yes.
Q. All kinds of projects that were part of the
research and development effort at Philip Morris.
A. Yes.
Q. And one of the things you mentioned, by the
way, was reconstituted leaf tobacco. You talked about
that for just -- just a smattering this morning, and I

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just want to clear up one thing about that.
You're not aware, are you, Doctor, of any
nicotine being used in the reconstituted tobacco
manufacturing process, other than the nicotine that
came from the tobacco itself that was used in the
process?
A. That's correct. The only nicotine that was
resident, as far as I know, or would expect at Philip
Morris -- I mean, I remember that report back a number
of years ago where the spiking of nicotine out of a
bottle -- I mean, Philip Morris would never do that, as
far as I know.
Yes, whatever was in the leaves that gets
squished out in this liquid extract and concentrated --
Q. Yes.
A. -- was what was put back, the amount,
depending upon how they recombined all this stuff.
So they had control over how much they put
back on the sheets. So, within that context, yes.

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Q. So, within that context, what you're saying
is they didn't add extraneous nicotine?
A. No. It was the nicotine that was originally
resident, whatever leaf products they were extracting.
Q. As far as you know, these allegations of
spiking are not true?

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A. Yes. Absolutely. And it was nothing I would
have ever expected a company like Philip Morris to ever
think of, let alone do.
Q. Okay. And you're not aware of Philip Morris
ever using reconstituted leaf to adjust nicotine
upwards in any commercial product that it actually
used?
A. Well, I'm not sure what you mean by upwards.
It was my understanding that sheet could be used and
was, on occasion, used to obtain a certain targeted
level of nicotine in the final product. And that was
part of the efficacy of that process. That was part of
the use of the process.
It's not just a filler, just a space filler,
but a way to introduce what you wanted to introduce to
the product.
Q. Okay. But my question to you, Doctor, is
whether you're aware of whether Philip Morris ever
actually, in a commercial product, with a specific
commercial product, whether it ever adjusted nicotine
in some way by adding nicotine to make it higher?
You're not aware of that; are you?
A. Again, I'm not sure how you're using the word
higher. I mean, if you look at the amount of nicotine
that was resident on the sheet at any one point in

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time, it could be varied by the way you handled the process.

I mean, there were times where it could be at the lower level, and there were times where it could be at a higher level.

Whether the company used that process to intentionally always make sure that the sheet had a massively high nicotine level to put into the product, I don't know if that ever occurred.

Q. Okay. Well, let me see if -- because I'm concerned that we're -- we may be confused a little bit here. I want to just show you a page from your deposition and make sure we're talking about the same thing. Okay?

A. Okay.

Q. So we'll take a minute.

Doctor, I'm going to hand it to you.

A. That's fine.

This is the deposition of --

Q. Yes. Yes. In this case.

A. Okay.

Q. Okay?

A. Yesterday?

Q. Right. This is a very timely deposition. This is a deposition that took place yesterday.

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And the question mainly -- it was confusing, but the question that was asked was -- this is on Page 44, Doctor.

A. Okay.

Q. I'm asking whether you are aware of whether Philip Morris ever used RL --

A. Excuse me. Where on the page? Where do I look?

Q. I think it's at the bottom, but let me take a look.

A. Okay. Down here?

Q. Yes.

A. Line 23?

Q. Right.

And the question is: I'm asking whether you are aware of whether Philip Morris ever used

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RL --
that's reconstituted leaf, right -- to adjust nicotine upwards, not whether it could be done, whether it was done?
And you answered: Not with regards to a specific product in which that was done.
Now, is that essentially -- you're not aware of any specific product in which --
A. Right. Which is kind of what I said.
Q. Right?

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A. I'm not aware of whether Philip Morris ever loaded up the sheet with a tremendous amount of nicotine and introduced it into a marketing product -- marketable product. I mean, they wouldn't have done that for a lot of reasons, but, no.
Q. Okay. You mentioned the word ratooning in connection with -- ratooning, r-a-t -- just hold it up there. Just put it up on the Judge's desk.
And I think you explained that ratooning is where you cut off the leaf before it's fully grown, you cut off the plant.
A. You cut the plant off fairly close to the ground, maybe just above the bottom few leaves.
Q. Okay. And I just had a question for you on ratooning.
Now, am I right, Doctor, just so we can get by this area, you don't know whether any leaves produced through ratooning ever got into production in any commercial cigarettes at Philip Morris?
A. No, I don't. I was only aware of it during the research phases of those projects.
Q. And the research phases, they were simply looking at various aspects of what happens when you ratoon tobacco; right?
A. They were doing field experiments to look at

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a number of criteria, one of which was nicotine production in the new leaves that grew up after.

Q. Sure. Because when you cut them off like that, a lot of things change; sugar can change, right?

A. Oh, a number of things can change.

Q. Right, so --

A. They were looking at a lot of things.

Q. They were looking at everything that changes when you do that?

A. I'm not sure it was everything, but they had certain targeted components, sugars, certain waxes, flavorants, and nicotine was high on the list.

Q. And that was in an experimental phase, and as far as you know, never used in a commercial process?

A. As far as I know. It was just being explored for possibilities.

Q. Now, Doctor, you've given your time to come here today, and I understand that the fee that you're charging for your testimony is $1,200 a day.

Is that approximately --

A. Something like that, only because it's taking time out of my normal functions with my clients.

Q. Right. And I was just going to say that.

And that $1,200 a day fee is to compensate you for income that you would otherwise lose because

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you're not doing your normal work; correct?

A. Yes. For specific clients --

Q. Right.

A. -- that I'm working with today. Well, not --

Q. I understand that.

A. Again, I want -- I don't want to mislead the Court. It's not like I get paid $1,200 every single day. But when I go to a client, which I would have

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today and yesterday and had to rearrange -- I don't do this every day of every year. I would be quite well off if I did. I wish I did. You know, I'm sure all of us do. But I had to be compensated because I'm on my own now. I wasn't where I was before where I was being paid by a corporation which was happy to give me time to do this.

Q. You're self-employed at this time?

A. I'm self-employed. I have to go out there.

Q. And make some money?

A. Drum up my own business.

Q. And you're not going to be able to work and be paid by your client. You're just simply making up for the income you would have lost?

A. Yes. And this is the first time -- and I'm not even happy that I had to do it this time. I just

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had to. I would have preferred to not do that. I have never in the past ever accepted monies or compensation, because this is something I just am morally convinced I need to do.

Q. And I understand your feelings, and I'm just saying -- and nobody is suggesting there's anything wrong with it -- your fee is $1,200; right?

A. Yes. For the time I'm appearing either in deposition or court, not for Sunday when I flew down here and not for tomorrow morning when I guess I'm flying back.

MR. HEIM: May I just have a minute, Judge? I may well be finished with the doctor.

I have no other questions, Your Honor.

THE COURT: Okay.

Redirect?

REDIRECT EXAMINATION

BY MR. ROSENBLATT:

Q. Dr. Uydess, your deposition was taken yesterday here in Miami; correct?

A. Yes, it was.

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Q. And with the magic of today's technology, it was typed up fast; we all have it. It's 184 pages; right?

A. I guess --

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Q. Take my word for it. It's 184 pages.

THE COURT: Take a look.

THE WITNESS: Let me take a look.

Okay.

BY MR. ROSENBLATT:

Q. Who took your deposition? Who was representing the tobacco companies; what lawyer?

I wasn't there, because I was here.

A. May I look at the names?

Q. Yes.

A. I don't want to take a guess. I think I know the correct name.

Q. Do you recognize him in the courtroom?

A. Him?

Him and them. It was a team.

Q. Who asked the questions?

Don't make a production out of this stuff --

MR. HEIM: Raise your hand.

MR. OTERO: (Indicating).

BY MR. ROSENBLATT:

Q. I want to know if you recognize the lawyer in the courtroom who asked you most or all of the questions.

A. I believe it was Mr. Hoag.

MR. ROSENBLATT: You're wrong.

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MR. HEIM: That's Mr. Rosenblatt.

THE WITNESS: Oh, excuse me.

THE COURT: I don't want to make a big production of it either.

THE WITNESS: Mr. Otero.

THE COURT: Whoever is the one who did it, identify himself.

MR. ROSENBLATT: The guy sitting next to Mr. Heim?

THE WITNESS: Forgive me.

BY MR. ROSENBLATT:

Q. You scientists make life -- the man sitting next to Mr. Heim?

A. Yes.

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Forgive me. I'm sorry.
Q. Got that straight?
A. Yes.
Q. By the way, did I understand you to say that in other cases, where you've given testimony, you didn't charge?
A. No. I did not want compensation, nor was I offered it.
Q. How did I get so lucky, billing me 1,200?
A. You happen --
Q. Just worked out that way?

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A. I happened -- I'm now an independent consultant and have to earn my living, not that I didn't earn it before.
Q. I haven't paid you anything yet, have I?
A. No.
Q. Be nice to me.
Now, you were asked about some documents. One document, the first one that Mr. Heim discussed with you was this document dated July 23, 1980 from DeNoble, Dunn, Osdene and Ryan to Dr. Seligman.
The bottom-line conclusion of this document is that nicotine is a reinforcer, but it's not addictive; right?
A. That's what's stated here.
Q. Yes. That's what's stated here?
A. Yes.
Q. Well, during the 11 years that you were with Philip Morris, wasn't that the party line at Philip Morris to the public --
MR. HEIM: Objection.
BY MR. ROSENBLATT:
Q. -- that it wasn't addictive?
THE COURT: Well, I'll sustain the objection as it relates to the party line to the public.
You can rephrase.

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BY MR. ROSENBLATT:
Q. Is this document consistent with the attitude and discussions of scientists on the subject of

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addiction during your 11 years with Philip Morris, or is it inconsistent with what you heard?

A. I'm sorry. Would you repeat that one time?

Q. Yes. I'm asking you if this document, which says nicotine is not addictive, it's merely a reinforcer, is consistent with what scientists were saying in your presence, in your discussions with them, in meetings you attended during your 11 years at Philip Morris?

A. No. Not totally, no.

Q. Now you said that one of the reasons you quit was because the paramount consideration of Philip Morris was market share and money. What ingredient in cigarettes was the key to maintaining market share?

MR. HEIM: Objection. Beyond the scope.

THE COURT: If he knows the answer. I don't know. Maybe he knows the answer to it.

Do you think you can answer that question?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: To cut to the quick --

BY MR. ROSENBLATT:

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Q. Yes, cut to the --

A. Bottom line, nicotine.

Q. Did the NOD project fail?

A. No. As far as I knew, it was technically successful. May have needed a few things, they could have improved it even further, but as far as what I was told by my management, outside contractors who were experts, other people at Philip Morris, chief engineers, it was successful.

Q. Now, I believe you mentioned something about the R&D headquarters in Switzerland.

Now, was INBIFO in Germany also considered to be R&D headquarters or was that something else?

A. That was totally different.

Q. In what way?

A. Well, first of all, most people at R&D

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understood that Philip Morris Europe's headquarters were in Neuchatel, if they knew anything about it. Almost no one at Philip Morris new anything about INBIFO. It was --

MR. HEIM: Objection, Your Honor. It's speculation. Move to strike.

THE COURT: Yes. It's a generalized term. I'll sustain it as referenced.

BY MR. ROSENBLATT:

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Q. Now, the letter that Mr. Heim referred to from Dr. Helmut Gaisch dated September 12, 1983, Dr. Gaisch was with the R&D section in Neuchatel, Switzerland; is that correct?

A. Yes.

Q. Was there -- was there a valid -- based on everything that you learned during your tenure at Philip Morris, was there a valid, scientific reason for killing the NOD project?

A. Not that I was aware of.

Q. Was there a valid, scientific reason for killing Dr. Gullotta's research or sending it to Europe?

A. Scientific reason?

Q. Yes.

A. Not that I was aware of.

Q. And was there a valid, scientific reason for killing Dr. DeNoble's research?

A. No. Not that I was aware of.

Q. Now, toward the end of Mr. Heim's questioning, you were having a discussion about the general level of science at Philip Morris in terms of the qualifications of the scientists, which you said was very high, and they made advances, and then you said, quote, where they made these advances, quote,

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without the rest of the world knowing about it, end

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quote.
What did you mean by that?
A. When Philip Morris decided to utilize a current technology and explore it for possible use inside, it wanted to elevate -- raise the level of science and quality associated with that so it could have a corporate advantage, and sometimes we'd use that work to develop new and novel information which it didn't particularly want anyone else to know about, so it kept it --
Q. Kept it secret?
A. Kept it secret, yes.
MR. ROSENBLATT: Thank you.
THE COURT: All right, sir. You may step down. I appreciate it very much. You're free to go.
All right. Let me talk with the lawyers, please.
(Discussion off the record.)
THE COURT: All right, folks. We were discussing the scheduling, and it looks to me like we won't have anything left for you to do this afternoon, but we'll have to have you come back tomorrow. I know that's going to break your heart.
But tomorrow should be a short day. Okay.

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Probably break around, well, before noon, I guess. At least that's what our intent is. So we'll do what we can.
All right. So the usual regulations apply over the night. Enjoy your evening and come back tomorrow morning at 9:15.
(The jurors exited the courtroom.)
THE COURT: You folks want to take five or something?
MR. ROSENBLATT: Yes. Could we?
MR. HEIM: Five minutes, Judge.
(A brief recess was taken.)
THE COURT: Mr. Heim, all this material you used with Dr. Uydess you can have back.

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Are we ready to proceed?
MR. HEIM: Yes, Judge.
MR. ROSENBLATT: Yes, Judge.
THE COURT: Who is going to do it?
MR. REID: Miss Pulley.
MS. PULLEY: I am, Your Honor.
THE COURT: I am on Page 5, which starts -- and I'll just go run through it.
MS. PULLEY: Actually, Your Honor, before we got started, we may be able to short circuit this because the defense maintains the entire thing is

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cumulative. We just heard --
THE COURT: I'm sorry?
MS. PULLEY: The entire deposition -- the plaintiff wants to put in the defendants' CEO. That's fine. We already put the CEO of RJ Reynolds. This is a predecessor CEO deposition taken back in 1984, and every single topic was covered with Schindler.
Perhaps, as we go through, that will become more apparent. Perhaps, after we talk about it, I can give you page numbers as to how they overlap.
Are cigarettes addictive? Are low-tar cigarettes safer? Why do you say they are safer? Is there a scientific controversy? What do the warnings say, and do you think they're true? What would it take to prove to you that smoking causes cancer?
So these are the exact same topics of a different CEO of the same tobacco company. There's no reason to repeat this testimony to the jury. Not only is it confusing to the jury, but things have changed since 1994 when Johnston was president, CEO of Reynolds.
For example, he talks about whether or not they're going to continue the Joe Camel campaign. That's misleading to the jury today because, obviously, Joe Camel has been ceased.

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For these reasons, we think it's cumulative and it's unnecessary. We should move on to the deposition of another CEO.

MR. ROSENBLATT: Well, my -- my answer to that is that, obviously, the plaintiff intends to show -- we say all of CEOs are lying and they're telling the same lies. And the fact, of course -- of course it covers the same areas, to show from our standpoint there is an industry party line, which is the fraud.

THE COURT: He's CEO as of when?

MR. ROSENBLATT: And it ain't my fault that they changed CEOs so often. Otherwise, there wouldn't be -- Schindler had been there a period of time, and if they hadn't fired Morgan and gotten somebody else, you know, there wouldn't be several CEOs, but I have no control over that.

MS. PULLEY: Sir, James Johnston was CEO from late 1993 until June of 1995.

THE COURT: I'm trying to get his dates here.

You say he was a CEO from when to when?

MS. PULLEY: Late 1993 to --

THE COURT: To?

MS. PULLEY: -- spring of 1995.

THE COURT: Okay.

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MS. PULLEY: And since 1995, Mr. Schindler has been the CEO.

THE COURT: But he worked there from '79 to '84.

MS. PULLEY: He worked there in the '80s, and then he left the company and returned again.

THE COURT: Yes. Things may have changed. He may have known things.

No. I don't have any problem with that. We'll see if there's anything that's really cumulative,

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11 as we go along to the point where it's inadmissible.
12 Let's just see what's in it. Okay.
13 Page 5, Lines 17 to 25. Page 6, Lines 1
14 through 6 are okay.
15 And then your counter-designation, Lines 7
16 through 25 on Page 6 and on Page 7, Lines 1 through 11
17 are all right.
18 Page 8, counter-designation, 15 through 25.
19 Line 1 on Page 9.
20 Line 23 through 25 on Page 9.
21 MR. ROSENBLATT: Wait. Excuse me.
22 THE COURT: Are you with me?
23 MR. ROSENBLATT: Yes.
24 THE COURT: Where did I lose you?
25 MR. ROSENBLATT: Our copy may not -- may

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1 not -- so if you just go a little slower, Judge.
2 THE COURT: Page 10, Lines 1 through 12,
3 counter-designation.
4 MR. ROSENBLATT: 1 through 12.
5 THE COURT: Page 11, 14 through 23.
6 And then they skip.
7 Page 18.
8 Now, you designated, plaintiff, Lines 5
9 through 25; they've objected. And we're talking about
10 a full-page ad in New York Times and Wall Street
11 Journal, the subject matter is what you're talking
12 about. And the USA Today.
13 Roll call.
14 In other words, there's some advertising on
15 some national media.
16 What's the objection?
17 MS. PULLEY: Our whole problem with this,
18 Your Honor, in addition to the ads about secondhand
19 smoke, it's not relevant, is that it doesn't describe
20 what the ad is about. Therefore, the testimony is
21 meaningless to the jury, if this is read to the jury.
22 THE COURT: Well, let's see.
23 Yes. I put a question mark on this, because
24 I didn't know what you were talking about.
25 Anyway, what it means is that you're

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advertising in various national publications. At the bottom on Page 19, the question: Do you have any other ads planned?

And the answer is: Yes, we do.

And then you drop it.

So I don't know what the relevance of these ad -- reference to the ads is.

MR. ROSENBLATT: We don't need this, Judge, on this page.

THE COURT: Okay. So we can eliminate Page 18 and 19.

Then there is a reference to the ads on Page 22 as to the cost, each bearing the cost of the ad. If you eliminate 18 and 19 --

MS. PULLEY: Yes, Your Honor, we would request all of 22 should be out, as well as the first line of 23, which we counter-designated, as an additional counter-designation.

THE COURT: Okay.

Now let's get to 26. There's a designation on Line 23 through 25, and on the top of Page 27, Line 1.

And plaintiffs' designation is from Line 10 to 25 on Page 27. And Page 28, Lines 1 through 15 and counter-designation by defense on 16 through 25.

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So that full page should be in.

Page 29, the entire page is a counter-designation. And on Page 30, Lines 1 through 12.

On Page 31, Lines 18 through 25, as well as Page 32, Lines 1 through 7.

Page 34, plaintiffs' designations, Lines 7 through 25. And apparently there was some sort of an error on Page 35, Lines 1 through 14, which was not designated by plaintiff, which should have been, so

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counter-designation is okay.
The rest of the page is plaintiffs' designation, so all of Page 35 is in, as well as Lines 1 and 2 on Page 36.
Page 37, Line 23 through 25, all of Page 38 and Page 39, Lines 1 and 2 all are in.
Page 40, I've allowed this in through other people.
MS. PULLEY: Yes, Your Honor, including Schindler.
THE COURT: 24 and 25 is in, over your objection. And all of Page 41.
Well, let's see.
42. Okay. We get down to Line 15 on Page 42. 1 through 15 is okay. Then you come up on Line

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16: Who started Joe Camel?
And then he goes on to explain it.
I didn't have any problem with that, Page 42 or 43, Lines 1 through 15.
Now, on Page 45 -- when was this taken, this depo, by the way?
MS. PULLEY: '94.
THE COURT: May 26th of '94.
Now, you ask here on Page 45, what are the present plans with respect to Joe Camel?
It goes on to explain what the plan is or whatever his interpretation is.
MS. PULLEY: Yes, Your Honor. Our problem is it's misleading because Joe Camel has been discontinued, and it's not relevant to this class action.
THE COURT: Well, yes and no.
MS. PULLEY: Your Honor will recall yesterday you only allowed in Joe Camel to go to show credibility.
THE COURT: Yes, but it's different here. I marked them all in, the whole kit and kaboodle here. I looked at it. Through page --
MR. HEIM: Your Honor, the relevance issue on Joe Camel, I think, goes to class members, not -- not

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possibly having seen or relied on Joe Camel.
THE COURT: No, but that's not the essence of it either. It doesn't have to be that. It could just go to show a pattern or plan of advertising, the mode and methods by which you're doing it. You don't necessarily have to use it for reliance.
So --
MR. REID: Unless we did something wrong with it, just the fact that we have an ad, obviously it's only being offered because they think there's something wrong.
THE COURT: It depends on what they say about it. Right now it doesn't say anything about it.
MR. REID: It shows that we were marketing to children. We, of course, deny that.
THE COURT: Well, the ad speaks for itself.
MR. REID: But there are no children in the case. If that's the reason they're arguing --
THE COURT: I'm not so sure there has to be children in the case to get that issue out. That's my problem. Okay.
It's difficult to see through this machine.
I let all of that in through Page 51, including your counter-designations, Lines 1 through 14.

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Now on Page 51, Lines 15 through 25, I marked it out. But I'm just trying to think about how it relates.
There's a question, a rhetorical question -- you say at the end of the question: I would bet you that 90 percent of the American people don't believe that. What do you think?
I mean, it's --
MS. PULLEY: Your Honor, this is in

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a larger
10 context of our counter-designations.
11 THE COURT: What? I'm sorry.
12 MS. PULLEY: This is a larger
context to our
13 counter-designation. It's an ongoing
conversation
14 between the plaintiffs and defendants. We're
not
15 interested in that one particular question,
but it
16 gives you flow in future questions when they
refer back
17 to it.
18 THE COURT: He sure does answer the
question.
19 Okay. I think what you could do --
if you
20 take out the rhetoric there and just end it at
the end
21 of the new smokers line, on Line 20, leaving
out, "I
22 would bet," et cetera, and then as far as the
answer is
23 concerned, if you start with Line 23, "I would
24 speculate."
25 MS. PULLEY: Okay.

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1 THE COURT: I think we could do
that. So
2 that will then put in all of Page 52, 53 and
54 up to
3 Line 12. I don't think we need 23 and 25.
4 What are we doing getting into this?
We're
5 talking about automobiles.
6 MS. PULLEY: Yes, Your Honor. It's
an
7 analogy to advertising for cigarettes.
8 THE COURT: Wait a minute. Let me
just
9 read -- I thought they were all tobacco until
I got
10 down to this one. Because he brings it up in
his
11 answer. He's the one who brings it up.
12 MS. PULLEY: Right, and it's
important.
13 THE COURT: He says a perfect
example, the
14 auto industry. Then he goes on to explain it
in his
15 answer. It wasn't a question in his answer.
He
16 brought it up.
17 MS. PULLEY: Right. It's his way of
18 explaining his point.
19 THE COURT: If it's his way of
explaining,
20 then I'll leave it in.

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21 Let's see. I would just put the whole page
22 in. Might as well get it all in there.
23 Okay. It makes more sense.
24 Page 54. Page 55, Line 1 through 4 and Line
25 5 and 6, and the first word on Line 7 I said should not

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1 come in. Just start that colloquy there with, "My
2 point is," instead of having an academic discussion
3 there. I'm not sure it's really needed.
4 MS. PULLEY: I'm sorry, Your Honor. Did you
5 just leave the question, the following issues, or
6 delete the answer?
7 THE COURT: Yes. Just that line. In other
8 words, "No. You've been hanging around lawyers a lot
9 because, you know, you're good at controlling the
10 dialogue," none of that should be in.
11 So it just starts with, "My point." That's
12 on Line 7.
13 MS. PULLEY: Is 1 through 4 in?
14 THE COURT: 1 through 4 is okay.
15 That's the answer.
16 And then you pick it up on Line 7 and carry
17 it through.
18 There's another academic discussion here on
19 advertising. That's nice.
20 Page 56, all of 56, top of 57, Lines 1 and 2.
21 Okay. Now, 57, Line 9 through 25. And I
22 marked all that out, as well as the next page, 58.
23 And all of the sudden he comes in with a
24 question on Page 59, the question on Line 2 and 3,
25 which is okay.

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1 And the rest of the page is okay.
2 MS. PULLEY: Actually, Your Honor, our
3 objection to the rest of the page is that the witness
4 does not get to answer the question.
5 THE COURT: Well, let's see. Well,

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he does.
He answers it down here on Line 23.
MS. PULLEY: Okay. The plaintiff asks the question again at Line 16.
THE COURT: Yes. But it's in context. It's all right.
Let's see. Page 60, the whole thing.
Page 61. What are we talking about?
We're trying to get a statistical sample of how many people smoke or don't smoke Reynolds. Did they do research? He doesn't have specific recollection but it's in the millions. More than five.
Now we're getting very esoteric, talking about advertising on Page 61.
You get down to Line 24, and the next page, I marked that out. Page 61, Line 24, 25, the entire thing.
MR. ROSENBLATT: Now, to us, Judge, the question at the bottom of Page 61 is really so basic.
THE COURT: A basic question.
MR. ROSENBLATT: Yes, because what his -- his

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thesis is that the millions of dollars spent on advertising get a certain small percentage of switchers.
THE COURT: Well, here is what the problem with all of this is. You asked the question and you say: Just have an agreement no one advertises, blah, blah.
And he says: I think the FTC would have a major problem with it.
Then we get into FTC and government regulation, and I really didn't want to get into that.
MR. ROSENBLATT: Well, but I think he's -- I think that's very instructive, because he's obviously avoiding a very simple question: What's the point of advertising?
You know, you're saying you spend these

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17 millions of dollars on advertising. You get a few
18 Marlboro smokers, they get a few Winstons, it's a
19 switch.
20 That's why it's so unbelievable that this
21 party line that they don't advertise for new customers,
22 they only advertise for switchers. He's saying it's a
23 wash.
24 MS. PULLEY: Your Honor --
25 MR. ROSENBLATT: So the hundred million

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1 Reynolds spends, it goes down the drain. The 300
2 million Philip Morris spends -- and he doesn't have an
3 answer. He is evasive. He said: Well the FTC would
4 have a problem with that.
5 THE COURT: Well, I don't even need that last
6 one.
7 MR. ROSENBLATT: I agree.
8 MS. PULLEY: Your Honor, it's argumentative.
9 It's an improper hypothetical, and it calls for an
10 opinion of the FTC.
11 THE COURT: I'm not worried about that. I
12 could always cut the FTC thing out. That's no big
13 deal.
14 All right. So he asked a question: What
15 would happen if you didn't advertise?
16 And you go way back down to Line 14 where he
17 says: Well, I wouldn't agree to it. Because he still
18 thinks he could win.
19 MR. ROSENBLATT: He says: I haven't lost my
20 job yet.
21 THE COURT: All right. Well, it doesn't
22 help; doesn't hurt.
23 If you take Page 61, Line 24 and 25 and just
24 ask right there, that's the question, and pick up the
25 answer on Line 14, Page 62, eliminating Lines 1 through

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13, it should be okay.
But then we get into foreign advertising,
which I don't really care to talk about. Page 63,
Lines 1 through 16, out.
No, the whole page, actually.
And the next page. They're talking foreign
markets, which I don't think is necessary.
So, eliminate Page 64, 1 through 19.
Now we have got a whole section here on a
business, which I've marked here, family and personal
smoking habits.
The first question you ask on the
counter-designation for whatever is: Do you remember
why you quit?
That was the counter-designation.
MS. PULLEY: Yes, sir, Your Honor. That's
only conditional. Our preference would be the next
five designations are out.
THE COURT: I'm sorry?
MS. PULLEY: The next five sets of
designations should all be out, because they're family
smoking.
THE COURT: Well, it depends on where we're
going with it. Let's see. The other one talked about
when they were kids and they were playing soldier and

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all that kind of thing, when they started to smoke.
MS. PULLEY: I'm afraid this one is not that
colorful.
THE COURT: And they were talking about how
to quit. Now they were talking about whether or not
you could quit.
MS. PULLEY: Page 68 starts with the
deponent's father's views on smoking, which clearly
aren't relevant to this case.
THE COURT: I'm not sure I'm there yet. I'm
on 68.
Okay. I left in Page 67, Lines 15 through
25; Page 68, Lines 1 through 24.
I don't see any -- any need to get

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into what
15 the father did or what the father died of.
16 Being a steelworker makes a big
difference
17 here, so I kept out Lines 1 through 21 on Page
69.
18 Back at the kitchen table.
19 You get very esoteric in this thing.
20 MR. ROSENBLATT: Pardon me?
21 THE COURT: You have some pretty
weird
22 conversations about babies.
23 MR. ROSENBLATT: I don't need all
that.
24 THE COURT: Well, what do you want
in or not
25 want in? Because that depends on -- if you
take it

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1 out, then all of their counter-designations or
2 objections get taken out.
3 I'm on Page 70. Do you need that?
4 MR. ROSENBLATT: Yes. No. I don't
need
5 that.
6 THE COURT: Eliminate Page 70.
7 What about 71?
8 That's when he starts to work for
RJR, and
9 they ask him -- oh, he tells them about
smoking. They
10 said don't worry.
11 I don't have any problem with that
being in
12 there, if you want. 71 and 72.
13 Line 8 through 25 on 71 and Line 1
on 72.
14 What else are we doing?
15 I skip now to Page 76. I culled
that one
16 out. I think you're talking about the
father's doctor
17 and his medical condition.
18 So, Lines 9 through 21 on Page 76 is
out.
19 Page 81. That's your standard jury
question.
20 MS. PULLEY: You kept out any
discussions
21 with children at other depositions.
22 THE COURT: I know I have, but then
it keeps
23 cropping up all of the time. I initially
marked it out
24 because of the children.
25 MR. ROSENBLATT: That's okay.

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THE COURT: 81, 82 is out. 83 is out.
84 I marked out from -- let's see. I better get back here.
On Page 84, Line 2 through 12 is okay.
MS. PULLEY: Your Honor, again, this is cumulative of Schindler's testimony about low-tar cigarettes.
THE COURT: It's okay. He just wants to know what he knows. He has a right to know that.
So, Line 13 through 22 on Page 84 is out, but I did a little scribble here.
Let's see. The question is on -- is where?
Well, there really isn't a question. The problem is this. When you get down to Line 12, then you make a gratuitous comment that you're the only guy in the tobacco industry that knows it by heart. We really don't need that.
Now we get -- I don't understand the question on Line 17. So I kept all that out, 13 through 25.
MR. ROSENBLATT: Well, the question on Line 25, Page 84 is --
THE COURT: Yes, but you don't know. If it's -- no. I kept that in.
MR. ROSENBLATT: Yes.
THE COURT: I said that's in.

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MR. ROSENBLATT: Okay.
THE COURT: I'm sorry. Line 13 through 22.
MR. ROSENBLATT: Okay.
THE COURT: Now, see, on Line 22, he starts the answer about being legally required to have it on packaging: Of course, we complied with that. Which basically is in response to the question on Line 17, except the question is so badly worded that you can't make a connection between the two.
If you want Lines 22 to 24 in, I was inclined to give it because it, more or less, is in

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favor of
your side, as it relates to the warnings, and then pick
up on Line 25 and the top of Page 85, Line 2.
MS. PULLEY: If we could start with --
deleted the "I don't know," the first one.
THE COURT: It says: I do know that we're
legally required to have that on the package.
MS. PULLEY: Right. Start there.
THE COURT: Yes. He's got to explain it some
way.
Okay. Page 90. All of Page 90 starting Line
8 to 25, and all of 91, from 1 to 22.
Now we get to another topic. Now we're back
to those ads again.
All right. I had a question mark on here

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because I didn't know where you were going with it. It
doesn't say anything.
MR. ROSENBLATT: What page, Judge?
THE COURT: Page 93.
MR. ROSENBLATT: Well, this is -- the ad is
on secondhand smoke anyway.
THE COURT: So that's out, right.
MR. ROSENBLATT: Okay.
THE COURT: 2 through 16 on 93.
Page 100, Lines 7 through 10, no objection to
counter-designation.
Now, I don't know where we get into this Page
102.
MS. PULLEY: It's merely context for what's
coming up.
THE COURT: I'm sorry, ma'am?
MS. PULLEY: It's merely context for what's
coming up on Page 104.
THE COURT: Well, you've got me on that one.
I'm trying to figure out how we can talk about
hamburgers that haven't come up yet. So I have to
start looking and seeing why he's talking about
hamburgers.
MS. PULLEY: The hamburgers part isn't
important. If we could start at Line 15.

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THE COURT: I know, but that's the question.
So I'm looking for a question.
MS. PULLEY: If it --
THE COURT: I'm just going to eliminate Page 102 and get to the question you're talking about, because there's no question.
MR. ROSENBLATT: It's a long answer to no question.
THE COURT: Yes.
MR. ROSENBLATT: Imagine if I asked a question, he'd still be talking.
THE COURT: All right. 102 and 103 and the top of 104 is out.
MS. PULLEY: Then all of 104 should come out.
THE COURT: Then now I've got a problem with 104: I rest my case, based on what you said.
I don't know what you wanted to do.
MS. PULLEY: Actually, Your Honor, I'd like to amend our counter-designations. If we could go back to Page 102 and start with line --
THE COURT: I don't know how you can put anything in context, because I don't know where you're going with it.
MS. PULLEY: If we can start with Line 15 on Page 102.

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THE COURT: Well, none of that makes any sense because the stuff before that hasn't been brought out.
MS. PULLEY: It's fine with me if you want to take 102 through 104 all out.
THE COURT: I'm not sure. I don't know where we're going with this. I'm looking for a definitive question and a definitive answer.
I'm inclined to keep 102 out. If I keep 102 out, now what? Now we get the answer, which is a long answer. And keep 103 out.
MR. ROSENBLATT: 102 out and 103

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out?
THE COURT: Yes.
Now, you've just picked up on Line 6, and I can't figure out --
MR. ROSENBLATT: That can come out.
THE COURT: Humn?
MR. ROSENBLATT: 104 can come out.
THE COURT: 104 is out. That eliminates the problem.
MR. ROSENBLATT: I'm trying to make it easy for you, Judge.
THE COURT: I appreciate it.
Page 106, apparently, is in.
Then there is a counter-designation on 107.

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So that's okay.
MR. ROSENBLATT: 106 is in from what line to what line?
THE COURT: I'm sorry. Let me go back.
3 through 14.
All of 107 is in. I don't have any problem with that.
And 108 is in, all of the way down from 1 through 16.
Page 109, Lines 18 through 25 is in. All of Page 110.
Now we get to Page 111. Now, we talk about the FTC requirements for tar and nicotine numbers.
And you're bumping up against preemption here, because the question asked, this means -- the advertising means that the cigarette with the least tar and least nicotine is the least dangerous from a health standpoint?
And then he said: No, that's not it. It's FTC requirements. But, nonetheless, it still butts heads with preemption.
Are you raising the preemption?
MR. ROSENBLATT: I'm sorry, Judge. This is on what page?
THE COURT: 111.

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MR. ROSENBLATT: 111.
THE COURT: I assume that you're going to -- you're jumping on that preemption issue.
MS. PULLEY: Yes, Your Honor.
THE COURT: Even though you say that's not the case.
MS. PULLEY: Our argument is merely we're required by the FTC to publish the tar and nicotine numbers. You can't then argue we're deceiving the public by doing so. That's why you run into preemption.
THE COURT: Well, they're not arguing that. That's the problem. You guys are.
MR. ROSENBLATT: We've never said -- we've never taken a position the warnings are insufficient in any way.
THE COURT: He just simply asked the question, does this -- is this what it means.
MR. ROSENBLATT: Yes.
THE COURT: He said: No, that's not what it means. All it means is that we're required to do it.
Now, then you get into an answer here, and that's a problem.
MR. ROSENBLATT: Well, this is --
THE COURT: Some smokers believe low tar is

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better for them. They have read whatever Readers' Digest or whoever says it, and they say, okay, it may be better for me. So, do we tell them it's better for them? Absolutely not.
MR. ROSENBLATT: That's the position. And you've heard -- you've heard me go through that with them.
Then what's the point? What's the -- and they say, well, we say it's another one -- another one of their big lies.
Well, that's what the market was; they wanted this lighter cigarette.

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13 But why?
14 Well, we don't know. Taste. We don't make
15 any health claims. Fine.
16 MR. HEIM: Wait a minute. They're not
17 allowed to make health claims.
18 MR. ROSENBLATT: No. They just did in the
19 Kool ad.
20 MR. HEIM: You can't make health claims you
21 can't prove.
22 THE COURT: That I don't understand, because
23 they did. The Kool ad did, and I don't understand
24 that. But that's really not before me at the moment.
25 But, you know, the thing that really bothered

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1 me is, who are we trying to kid? We're sitting around
2 here and playing these esoteric games with each other.
3 Our cigarettes have the lowest tar in the
4 world, what is that supposed to mean to somebody?
5 That means it's better for you. I don't care
6 which way you slice it.
7 MR. HEIM: Of course.
8 MR. ROSENBLATT: Of course.
9 MR. HEIM: Of course.
10 THE COURT: Now the question is --
11 MR. ROSENBLATT: Now they deny it.
12 THE COURT: Now the question is, is that the
13 reason they're putting it in there? They say, no, we
14 can't say that. We can't say it's better for you, we
15 can't make any reference to the health characteristics.
16 MR. ROSENBLATT: But in a deposition --
17 THE COURT: We're going to say it's lower
18 than anybody else's, which makes it better.
19 MR. HEIM: You'll get different people who
20 will say different things about the product.
21 MR. ROSENBLATT: The truth is, if it's a
22 safer cigarette -- they're admitting the old cigarettes
23 or the high-tar cigarettes are unsafe.
24 It's all litigation, all strategies,

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all
25 lies.

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1 THE COURT: They say that that's preemptive,
2 because you can't even allude to it. If somebody else
3 alluded to it, they would jump up and down hollering
4 and screeching that somebody is violating the
5 preemption rule.
6 I mean, suppose one tobacco company says, our
7 cigarettes have less tar than the other does; that
8 means it's a safer cigarette than the other. If that's
9 the case, therefore, the warnings don't apply.
10 I mean, it boggles the mind.
11 MR. HEIM: I think there's FTC regulations
12 that say you cannot say that your cigarette is safer
13 than another company's cigarette.
14 THE COURT: Yes, I know that.
15 MR. HEIM: Unless you have absolute,
16 biological proof of that.
17 THE COURT: I'm not so sure they can even say
18 safer. They can just say what it is.
19 I don't know. Maybe you're right. Maybe
20 they could say if you have biological proof by having
21 less tar in your cigarette, it's a safer product than
22 the other guy's cigarette, who has more tar.
23 MR. HEIM: Right.
24 THE COURT: And they allow you to say it's a
25 safer cigarette.
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1 MR. HEIM: Well, they say you can't say that.
2 THE COURT: No. Unless you can prove it.
3 MR. HEIM: Unless you can prove it.
4 THE COURT: So, what do you do? You take
5 three people, each one smokes a different cigarette,
6 and you wait until someone dies? No, that doesn't make
7 any sense.
8 MR. HEIM: No, it don't.
9 THE COURT: There's no way you can prove it,

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which is the problem. So it's a Catch-22.
MR. HEIM: Exactly.
THE COURT: I don't know. I just questioned it because it smacks of preemption. That was the first impression I had, and I didn't want to run afoul of it.
And I'm not sure what to do with it. But the more I try to think about it, the more I try to analyze this situation, the more bogged down you get in it.
See, the tobacco companies realize that there's only two reasons they smoke low-tar cigarettes. One is largely driven by taste, and the other is because they really, truly believe it's better for them.
MR. ROSENBLATT: But we don't tell them that.
MR. HEIM: We just went through that.
THE COURT: Yes, I know. And do we tell them

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it's better for them?
Absolutely not.
MR. ROSENBLATT: This is a fundamental position of the tobacco industry, and this is the CEO, and it should be in.
MS. PULLEY: The question runs right into preemption, Your Honor. Your gut instinct is correct to exclude it.
MR. ROSENBLATT: No, that is not the Judge's instinct.
THE COURT: Yes. My gut instinct is it did, and now I'm trying to figure out if it doesn't. First impression.
I'm serious. I have a problem with this, overall.
See, you first talk about advertising, and the preemption talks about advertising and any means of communication, about health issues and warnings, and that is where it runs smack up against each

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other.
Okay. Page 111. I'm going to keep it out, through 19.
MR. ROSENBLATT: You know, although -- that's -- I think that's an inconsistent ruling with other CEOs. I think you've let other CEOs answer it.
THE COURT: Not like that.

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MR. ROSENBLATT: Really? I thought I read from Morgan and Schindler pretty much the same exact thing --
THE COURT: I don't think so.
MR. ROSENBLATT: -- that they're saying we don't say it is, but the public believes it. I think that's in. I really do.
THE COURT: No. It's the way the question is worded. You definitively talk about health aspects.
MR. ROSENBLATT: It's not that big a deal, this question and answer.
THE COURT: It's not that big a deal. It's so limited. I'm so hamstrung with the federal regulations and this preemption stuff.
All right. 113, I don't have any problem with 113.
And 114. I don't see any reason for 114.
MR. ROSENBLATT: I agree with you.
THE COURT: So we quit it at Page 113, Line 25, through 114, Lines 1 through 9.
MS. PULLEY: I'm sorry, Your Honor, is Page 114 --
THE COURT: Out?
MS. PULLEY: -- out.
THE COURT: 115, what are we talking about

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here?
I had no problem with that, Lines 6 through 17 and the rest of the page is okay.
And the top of Page 116, Lines 1 through 4.

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Okay. Page 117. What about Yul Brynner?
MR. ROSENBLATT: That's good stuff.
MS. PULLEY: We object to this on numerous grounds. First of all, it's hearsay. The question repeats out-of-court statements of Yul Brynner.
Second of all, it's irrelevant. This deponent's opinion or reaction to the Yul Brynner message isn't relevant.
Third, it's argumentative. Including, if you'll notice, the plaintiffs' lawyers says in his question that he found Yul Brynner's statement moving, a very, very moving ad.
THE COURT: Okay. I marked it out, 117, Lines 5 to 25; and 118, 1, 2, 3, out.
Is there much left?
MS. PULLEY: Page 140, Your Honor.
THE COURT: 140.
MR. ROSENBLATT: What did you do to Page 118?
THE COURT: The Yul Brynner thing is out.
You ask him this question: Did you lose any sleep over it? And he starts to talk.

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Page 140, let's see what I've got on 140.
A suit for the EPA -- I've been keeping other lawsuits out. Page 140, Lines 7 through 21 is out.
Page 143, what statement are you talking about?
You make a statement here, quote, in my book you get an A-plus for this very forthright statement. And then you quote a statement.
Is this a statement he made?
MR. ROSENBLATT: I'm sorry?
THE COURT: On Page 143.
MR. ROSENBLATT: Yes. That's a statement. Yes, he said that to Congress.
THE COURT: He said to Congress?
MR. ROSENBLATT: Yes.
THE COURT: So, this is something he did say?
MR. ROSENBLATT: Yes. And I said:

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What you
18 were telling Congress was --
19 THE COURT: Well --
20 MR. ROSENBLATT: -- even if you put
us out of
21 business --
22 THE COURT: Okay. 143, I left that
in.
23 MS. PULLEY: Just for the record,
Your Honor,
24 our objections were that it was protected
speech,
25 because it was our CEO testifying before
Congress as

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1 the result of regulation.
2 And also it's irrelevant. We're
talking
3 about a black market. That could be highly
misleading
4 to this jury as to what's going to happen as a
result
5 of this lawsuit and whether there will be a
black
6 market in cigarettes.
7 It's not relevant to any issue being
tried in
8 phase one.
9 THE COURT: Well, you may be right,
too.
10 Yes, we're talking about criminal
activity
11 here.
12 Well, overall, I guess you're right.
It
13 really doesn't have anything to do with phase
one.
14 Okay. 143 is out.
15 144. It says he doesn't know
anything about
16 R.J. Reynolds and Brown & Williamson. Back in
1963, he
17 has no knowledge of that.
18 Okay. I cut out 144, unless you
want in your
19 designation.
20 MS. PULLEY: That can be out.
21 THE COURT: All right. 144, 145 is
out.
22 I kept it out in other cases.
23 Anything else?
24 MS. PULLEY: 154. This deals with a
souvenir
25 shop in Winston/Salem.

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1 THE COURT: Souvenir shop?
2 MS. PULLEY: Yes, sir.

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THE COURT: Souvenir shop. Smoking Joe's Racing, what does that mean?
MS. PULLEY: I believe it's a bumper sticker, sir.
THE COURT: "Thank you for smoking. Smoking permitted." That's a sign.
Oh, come on, now. You really want all this stuff in?
All right. I marked that out.
154. Stick with the case. Stick with the case.
Page 159, question on Line 24 and 25 and top of Page 160.
Let's see. You take this one down to Line 14. That's okay.
Then talking about statistics. Finish it off with line -- the answer doesn't make any sense.
Okay. 1 through 14 is okay. 15 through 25 apparently is out.
And the same with 161. That's out.
What else do we have?
Page 164, Lines 18 through 21. That's a counter-designation, which is okay.

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I guess that's it.
It gets worse and worse.
All right. We'll do what we can with it.
Ten after five.
Okay. Well, see you folks at 9:30.
MR. ROSENBLATT: So, it's hard to say how long this will take, but that's all --
THE COURT: It won't take a couple hours, at most.
MR. ROSENBLATT: Judge, in terms of my witnesses, first of all -- this will only take a minute or two.
I gave defense counsel this letter. Why don't you just look at it.
This has to do with scheduling for next week. But there's another issue I want to bring up.
THE COURT: Let's see. Week after Thanksgiving.

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MR. ROSENBLATT: Right.
THE COURT: What are we doing the week after Thanksgiving? That's the week of December --
MR. REID: Next week.
THE COURT: -- December 30th -- December 1st. And I'm not so sure about the 4th.
MR. ROSENBLATT: The 4th?

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THE COURT: The 4th. We've got a problem with the 4th to begin with.
MR. ROSENBLATT: That's with installation.
THE COURT: Yes. Friday, the 4th, is the bi-annual ceremony to honor judges who have retired. Whatever that means. They need the courtroom.
THE BAILIFF: They said we could have another courtroom.
THE COURT: We can have another courtroom, yes, but I was hoping to be gone myself on Friday.
MR. ROSENBLATT: Now, the other thing I wanted to bring up about -- about next week, in terms of -- in terms of witnesses -- I'll let you read that.
THE COURT: Okay. You want to use Dr. Cummings.
MR. ROSENBLATT: Yes. I mean, I'm just basically offering -- and I don't think you have an answer for me yet, as to whether you --
MR. HEIM: No. I don't know what these articles are.
MR. ROSENBLATT: That's fine.
MR. HEIM: I just got handed the letter, and I'll look at it.
MR. ROSENBLATT: I just want to make you aware of that. That's not a problem.

THE COURT: Okay.
MR. ROSENBLATT: The thing --
THE COURT: Yes.
MR. ROSENBLATT: Okay. You remember I brought up this issue of Dr. Wanner.

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THE COURT: No.
MR. ROSENBLATT: Okay. I'll remind you.
Dr. Wanner is a Miami pulmonologist.
THE COURT: Oh, yes. Okay.
MR. ROSENBLATT: Cumulative, cumulative.
So, I said, okay, I'll drop Dr. Wanner.
Then, what do they do? They designate stuff
they want to read from their discovery deposition. And
I say --
THE COURT: Of Dr. Wanner?
MR. ROSENBLATT: Yes. I said, if that's
permitted, I want to call him and put him on.
THE COURT: You want to call him as your
witness?
MR. ROSENBLATT: No, no.
THE COURT: He wants to call him.
MR. ROSENBLATT: No, they don't want to call
him. They want to read.
THE COURT: From the plaintiffs' case.
MR. HEIM: No, Judge. Here is what --

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THE COURT: You want to use Dr. Wanner's
testimony on your case?
MR. HEIM: The pretrial --
THE COURT: You can do that. He's free to
use all of the testimony.
MR. HEIM: He can counter-designate.
MR. REID: During our case.
THE COURT: He can do that.
MR. HEIM: If we do.
THE COURT: Not a question. You can do that.
MR. HEIM: Well, in the pretrial order, we
had actually talked about this before Your Honor signed
the pretrial order, we said, what happens if one side
offers a witness who is deposed and then withdraws it?
And we worked it out by talking it through,
that the other side would have five days to designate
from that deposition, if they wanted to designate it
for possible use in their case.
THE COURT: Uh-huh.

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20 MR. HEIM: So we did that. We used that part
21 of the pretrial order, and we took some of Dr. Wanner's
22 testimony, and we said, we're designating that for use
23 in our case when we get to it.
24 And that's what counsel is referring to.
25 THE COURT: I see. But it is part of the

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1 order?
2 MR. HEIM: Yes, sir. It's part of Your
3 Honor's order.
4 MR. REID: Yes, sir.
5 MR. ROSENBLATT: But that's a totally unfair
6 result, if they're permitted to do that.
7 It's there -- we didn't ask him questions.
8 It's their discovery deposition.
9 Because of their efforts to say it's
10 cumulative, you know, I can't call him, but they can
11 read the good stuff from their -- and I have the great
12 privilege of counter -- of counter-designating -- using
13 their, you know -- it's not fair.
14 Either he's not called because -- or if
15 they -- if it's that big of a deal to them to get in
16 his counter-designations, then I should be permitted to
17 call him. I'm not saying you have to decide this, but
18 it's --
19 MR. REID: It's either cumulative or it's
20 not. We're getting several different issues all
21 intertwined here.
22 The first question, I guess, is it
23 cumulative. After that's decided, and you apparently
24 ruled --
25 THE COURT: Obviously, there is some good

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1 stuff you want in it.
2 MR. ROSENBLATT: Absolutely.
3 MR. REID: It's cumulative.
4 MR. ROSENBLATT: Not in his deposition.

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There's opinions.
THE COURT: In his deposition, there's not any good stuff?
MR. ROSENBLATT: No. It's their discovery depositions.
THE COURT: I've seen discovery depositions where the whole kit and kaboodle was out.
MR. ZACK: I was there, Your Honor. What happened is the original designations that he disagreed with, and questions were asked by both sides --
MR. ROSENBLATT: Well, what, 95 percent and five percent? There were a few questions.
MR. ZACK: You indicated there were not questions asked.
MR. REID: But it boils down to, it's still cumulative. Just because there might be a part we want to read later in our case doesn't mean it's not cumulative now. It would be unfair to allow the fifth pulmonologist to come in and testify, or whatever we're up to.
THE COURT: Supposing he wants to put him on

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in your case?
MR. REID: You mean counter-designate from the deposition?
THE COURT: Or take a deposition in order to do so.
MR. REID: Take another deposition?
THE COURT: Yes.
MR. REID: That he would then cross --
THE COURT: Considering you're going to use him for another purpose.
MR. REID: I've raised a lot of other questions. I suppose -- are you asking could he be called as rebuttal at that point?
THE COURT: No.
MR. REID: He couldn't take another deposition to read to ours, because it would be our case, not his, so --

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THE COURT: We're running into a lot of little technical problems.
MR. REID: Oh, sure.
THE COURT: I'm just tying to figure out how to do it fairly so that everybody gets a fair shot.
Let's suppose, for example, you did have a deposition and suppose they withdraw him and there was no deposition. Then you would call him.

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If you figured you were going to call him, wouldn't it be fair that they would have an opportunity to take his depo?
MR. HEIM: Yes, except that --
MR. REID: They would have had to list him, and there would have a bunch of processes.
THE COURT: You would have had to list him, too.
MR. REID: We would have had to list him.
THE COURT: Did you in this case?
MR. HEIM: No.
THE COURT: How can you read his depo?
MR. HEIM: We can read his depo because --
THE COURT: They withdrew him.
MR. HEIM: Because, as we said, when we talked about this beforehand --
THE COURT: If it wasn't for the trial order, you couldn't do it.
MR. HEIM: I don't know about the evidentiary rules. If it wasn't for the trial order, we would not have had him named as one of our experts, so I guess we couldn't have done it. We wouldn't have known about what his testimony was going to be.
But he testified in a particular way, some of which -- a good part of which is helpful to the

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plaintiff, but there were a couple of things that he

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said that we liked.
So when he withdrew him, we said, okay, for our case, we'll put those few things into our case. It wasn't a lot. Just a few things that he said. That's my understanding of what happened.
MR. REID: I think when you talk about fairness, the plaintiffs have been able to put on a lot of pulmonologists already. The jury has heard from a lot of them. The plaintiffs aren't going to be prejudiced by putting on the fourth or fifth, whatever number it is, pulmonologist.
THE COURT: It depends on what you want to read that he can't counter-designate, is the point.
MR. REID: We'd probably need to get the deposition out.
MR. HEIM: I think we need to look at it --
MR. REID: When we get to our case.
MR. HEIM: -- because I don't remember what it is.
MR. REID: It may be hypothetical, too. We just had to do this in five days.
MR. HEIM: Well, we ought to go -- we ought to look through the deposition.
THE COURT: Why don't you look through the

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deposition and see what's in it, and there might just be something in there that both of you want, and it will work itself out.
I think we ought to file this, Bill.
THE CLERK: Yes, sir.
THE COURT: Okay.
(Court was adjourned at 5:30 p.m.)

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